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MUSSALMAN LAW

A TREATISE

ON PERSONAL LAW ACCORDING TO THE HANAFITE SCHOOL

WITH REFERENCES TO ORIGINAL ARABIC SOURCES AND DECIDED
CASES FROM 1795 TO 1906.

BY

NAWAB

A. F. M. ABDUR RAHMAN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW ; JUDGE, PRESIDENCY COURT OF
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TO
THE HONOURABLE
SIR JOHN STANLEY, KT., K.C.,
CHIEF JUSTICE, HIGH COURT OF JUDICATURE, NORTH-
WEST PROVINCES,
THIS WORK
IS,
BY HIS LORDSHIP'S PERMISSION,
RESPECTFULLY DEDICATED.

PREFACE.

THE works on Mussalman Law in the English language are too few in number to require an apology for the publication of a new book on the subject. But a brief account of the origin of "Institutes of Mussalman Law" may not be devoid of interest to the public. Those of my readers whose interests in law or politics travel beyond the boundaries of India may remember that more than thirty years ago the *Règlement Judiciaire* which sanctioned the establishment of Mixed Tribunals in Egypt for the purpose of dealing with questions arising in civil suits between the Egyptians and the subjects of the Powers, also provided for the publication of the laws relating to the personal status of the Egyptians.* Accordingly the Egyptian Government commissioned a Council of the leading *Ulemas* of the University Mosque of Al-Azhar, the greatest seat of Islamic learning, to prepare under the presidency of Kadri Pacha, a Judge of the Mixed Tribunal of Appeal at Alexandria, a Code of Mussalman Law. The result of their labours was a compendium of law based on Arabic works of indisputable authority and weight which, being translated into French by Kadri Pacha, under the name of

* Article 36 of the *Règlement Judiciaire* runs as follows :—" *Il (le Gouvernement Egyptien) publiera également les lois relatives au statut personnel des indigènes.*"

"Droit Musulman du statut personnel, et des successions d'après le rite Hanafite," received the sanction of official recognition by the Mixed Tribunals in Egypt.*

Many years ago while passing through Alexandria on my way from Europe to India, I met Sir John (then Mr.) Scott, a Judge of the Mixed Tribunal of Appeal and subsequently a Judge of the Bombay High Court, who, in the course of an interesting interview, drew my attention to the excellent work of Kadri Pacha as the only attempt at codification of Mussalman law, which had the merit of receiving the hall-mark of the sanction of a Mussalman Government. Later on, as Judge of the Bombay High Court, Mr. Justice Scott, whilst deploring the difficulties which the Indian Judiciary had to contend with in the administration of Mussalman Law, urged me to write a treatise on the lines of the Code of Kadri Pacha, adapted to the needs and requirements of my co-religionists in India. Circumstances, however, prevented me from carrying out immediately the suggestion of Sir John Scott. A few years ago, thinking myself in a better position to do so, I wrote to Lord Cromer enquiring whether Kadri Pacha's work was still treated as an authority on Mussalman Law. His Excellency, after consulting the legal advisers of the Egyptian Government, very kindly wrote to inform me that "the work in question was an undoubted authority on Moslem Law." Thereupon I began to work on the lines suggested by the late Sir John Scott. "Institutes of Mussalman Law" may, therefore, be regarded as a work which owes its inspiration to, and is mainly based on, the *Droit Musulman* of Kadri Pacha.

* See remarks of Scott, J., in *Abdul Kadir Haji Mahomed v. C. A. Turner* (I. L. R., 9 Bom., 158), "Institutes of Mussalman Law," p. 273.

Before, however, I explain the plan followed by me in the following pages, I should like to give a short sketch of the history and position of Mussalman Law in British India.

When the East India Company undertook the administration of Bengal, Warren Hastings in 1772 established a number of Civil Courts, and directed that in all civil cases Mussalmans were to be governed by the laws of the Koran. Mussalman Law Officers well versed in Arabic were, consequently, appointed for the purpose of expounding the laws of Islam. This state of things continued until the abolition of these Officers in 1864. That far-sighted statesman also happily conceived the idea of having some of the standard Arabic books on Mussalman Law translated into English. Under his distinguished patronage the *Hidayah*, the *Serajiah* and the *Sharifah* were for the first time made accessible to English readers. Subsequently, after nearly half a century, Mr. Neil Baillie compiled his "Digest of Mahomedan Law" from translations of extracts of the *Fatawa-i-Alamgiri*, the celebrated collection of law cases compiled under the auspices of Aurangzib and designated after the title of that great Emperor. These are still the standard works on Mussalman Law for the use of Indian Courts and English lawyers, but their scope and extent being of a limited character they have not adequately fulfilled the objects with which they were brought out. Thus, it is that through no inherent defect in the system, no lack or paucity of materials in the original Arabic, the laws of Islam, enveloped as they are, for the most part, in the ample folds of mediæval tomes written in the rich and exuberant language of Arabia, remain a hidden mystery to our Judiciary and Executive, as well as to the European student unacquainted with the tongue of the Prophet

of Islam. A well-known Anglo-Indian writer comments on the situation as follows :

“No country is more interested than ours in facilitating a proper course of study of the Islamic Law. We have a very large Mahomedan population subject to our rule which is passionately attached to its personal law. We have guaranteed that all matters regarding marriage, inheritance, and caste, and other religious usages and institutions, affecting Mahomedans, shall be governed by the laws and usages of Mahomedans. It behoves us, therefore, as a nation to see that those who have to administer these laws have facilities afforded to them of studying the same. Something was no doubt done in the earlier days of our Government in India to discharge this imperative duty. But much remains to be accomplished before it can be justly said that we have done our duty. There are many important books on Mahomedan Law which are removed from the cognizance of our Courts because they are composed in a language which is unknown—to European officers at all events who preside over them. Surely, some efforts might be made to have the best of these translated by competent scholars.”

This defect, however, is remedied by the fact that the time-honoured custom of interpreting and expounding Islamic Law by a direct research into the original sources contained in the voluminous treatises and commentaries in Arabic which obtained during the Mussalman rule in India, and which obtains to-day in Turkey, Egypt and Arabia, is still in some measure maintained in British India. When abstruse and intricate questions of Mussalman Law and Jurisprudence are involved in a case before an Indian Court, help is generally sought of the Maulavis versed in Arabic, and translations are made from the original Arabic

authorities for the particular occasion and some kind of solution is effected. But this mode of instructing the Bench and the Bar involves great hardship and entails much trouble and expense on the litigants. It is deplorable that the condition of things in India does not favour researches into Mussalman Law, or its study from the original Arabic sources by our students, and such of them as have devoted themselves specially in that behalf, are not, as a rule, called upon to occupy that position in life to which their learning and ability entitle them and where their special knowledge of the subject could be utilized for the benefit of the public. Such a situation, it is needless to say, is by no means satisfactory to the Mussalman community of India.

While the Personal Law of the Mussalmans was being thus administered by the Indian Courts, Lord Macaulay's Indian Law Commission were engaged from 1833 in formulating proposals for the reform of Judicial establishments, Judicial procedure and law of India, and fully after twenty years, their recommendations were submitted in March 1854 to Lord Romilly's Royal Commission, for examination and consideration. In December 1855, however, the Royal Commission submitted their report, in which among other things, they remarked as follows :

“If on any subject embraced in the new body of law it should be deemed necessary that for a particular class of persons or for a particular district or place there should be law different from the general law, and if there shall be no particular and cogent objection to the insertion of such special law into the proposed body of law, such special law, we think, ought to be provided in that way. But it is our opinion that no portion

either of the Mahomedan Law or of the Hindu Law ought to be enacted as such in any form by a British Legislature. Such Legislation, we think, might tend to obstruct rather than to promote the gradual progress of improvement in the state of the population. It is open to another objection too, which seems to us decisive. The Hindu Law and the Mahomedan Law derive their authority respectively from the Hindu and the Mahomedan religion. It follows that, as a British Legislature cannot make Mahomedan or Hindu religion, so neither can it make Mahomedan or Hindu Law. A Code of Mahomedan Law, or a digest of any part of that law, if it were enacted as such by the Legislative Council of India, would not be entitled to be regarded by Mahomedans as very law itself, but merely as an exposition of law, which possibly might be incorrect. We think it clear that it is not advisable to make any enactment which would stand on such a footing."

The labours of the Indian Law Commissioners resulted in the production of a series of most valuable codes. But the question of the extension of the process of codification to Hindu or Mussalman Law was never taken up seriously, and the opinion expressed by Lord Romilly's Commission remains unchallenged.

Notwithstanding the immense advantages of codification, the Government is handicapped by the consideration that any attempt to codify Mussalman Law may be received with serious misgivings by the general body of the Indian Mussalmans as an encroachment upon their religious liberty. How far it would be feasible in the future to bring about a general agreement among the Indian Mussalmans, with regard to the codification of their Personal Law, by the pressure of practical needs.

or other causes which brought into existence the French Codes, the Italian Codes, and the German Codes,* it is indeed difficult to prognosticate.

The difficulties which beset the path of the Government in the accomplishment of such a task are correctly appreciated by Sir Courtenay Ilbert. In his admirable work on the Government of India he remarks :

“Those difficulties arise, not merely from tendency of codification to stereotype rules which, under the silent influence of social and political forces, are in process of change, but from the natural sensitiveness of Hindus and Mahomedans about legislative interference with matters closely touching their religious usages and observances, and from the impossibility in many cases of formulating rules in any shape which will meet with general acceptance The difficulty begins when a particular code is presented in a concrete form. Even in the case of such a small community as the Khojahs, who have contrived to combine adhesion to the Mahomedan creed with retention of certain Hindu customs, it has, up to this time, been found impossible to frame a set of rules of inheritance on which the leaders of the sect will agree. And any code not based on general agreement would either cause dangerous discontent or remain a dead letter.”†

I now proceed to explain the scope, arrangement and method of the present work and to indicate its sources.

The rite of Abu Hanifah is the State religion of the Ottoman Empire, and the Mussalman Law as interpreted by him is the same all the world over wherever followers of the

* See “*The Government of India*” by Sir Courtenay Ilbert, p. 340.

† See *Ibid.*, p. 339.

great Imam are to be found, whether in Turkey, Egypt, Arabia or India. I have, therefore, based my work, as already stated above, mainly on Kadri Pacha's Mussalman Code, and the rules of law laid down in the different Articles have been carefully collated with the original Arabic copy supplied to me by the kindness and courtesy of Lord Cromer. Such Arabic commentaries and works on Mussalman Law as have become recognized and acknowledged authorities in India, by virtue of their authenticity, antiquity or the erudition of their authors, I have utilized for the purpose of this treatise. Of these works I have given a short history in the Bibliography. I have further endeavoured to trace the original sources of every rule of law laid down in the different Articles and have collected the corresponding original Arabic texts in the Appendix, Article by Article, in order to enable the reader to go direct to the original sources without much trouble and find out for himself the true and correct law. I have also given references to Baillie's Digest of Mahomedan Law,* Hamilton's English translation of Hidayah,† and Macnaghton's Principles of Mahomedan Law,‡ for the purpose of enabling the reader immediately to see how those authorities lay down the same principles in an uncodified form. For the benefit of those of my readers who have the time or inclination to make a further research into the rules of law laid down in this treatise, I have given references to two admirable modern works relating to Kadri Pacha's Mussalman Code, viz., Monsieur Eug. Clavel's Commentaries entitled "*Droit Musulman, du statut personnel et des successions d'après les différents rites et plus particulièrement d'après le rite Hanafite*" § and Professor

* London, 1865.

† By Standish Grove Grady, London, 1870.

‡ Calcutta, 1825.

§ Paris, 1895.

Mahomed Zaidunil-Ambani's Commentaries on *Al Ahkam-ul-Shariah-fil Ahwalil-Shaksiah*.* I have also collected important decided cases in the Indian Courts and the Judicial Committee of the Privy Council, from 1795 to 1906, and arranged them under the different Articles in order to enable the reader to know the case-law bearing on them. Such Acts and Statutes as are applicable to the different Articles, have also been noted. In short, the object I have in view is to bring out a handy book on Mussalman Law with materials already alluded to, so that the minimum of labour on the part of the student may yield the maximum of result : whilst those with more time and patience have all the resources at their disposal for obtaining a fair mastery of the subject.

I also desire to note that I have carefully collected the important decided cases under the Shia School and inserted them in their proper places, in order to enable the reader to see the divergence of that branch of law from the Sunni School.

In the present treatise, among other things, I have dealt with the law relating to marriage, dower and divorce, the law relating to children including paternity and filiation, suckling, fosterage, the custody of children, maintenance of parents by their children, maintenance of relatives other than ascendants and descendants, and the law relating to Gifts, Wills and Executors. With the rise of the sun of learning in the West and of Western domination over the East, the study of Oriental languages in India has, owing to various causes, fallen into the back-ground, and Indian Mussalman youths are not infrequently obliged to learn their own Personal Law in English translations. It is hoped that it may be of some advantage

* Egypt, 1903.

to them to have a full and comprehensive exposition of Mussalman Law based on the original Arabic texts carefully selected for their benefit. It is a matter of common knowledge that in every well-regulated Indian Mussalman household, most of the rules on Mussalman Law are, consciously or unconsciously, strictly adhered to, although seldom, if ever, a case arising out of them comes up before a Court of Justice. An intimate acquaintance, therefore, with the law relating to the reciprocal rights and duties of husband and wife, of parents and children, and maintenance of relations, are of supreme importance. Mussalman religion and law are bound up together and the Koran itself contains a great code of rules regulating the whole of the private and public life of a Mussalman. As religious training and moral discipline are essential for the formation of character of a Mussalman youth, it is equally important for good government and good citizenship that he should be conversant with the true principles of his own Law either through the medium of Arabic or English.

The motive of many a crime among the Indian Mussalmans remains unfathomed, and the cause of many a life-long hostility untraced, for want of familiarity with the forces which influence and dominate the life of a Mussalman. I, therefore, venture to think that an acquaintance with the subject dealt with in this treatise may prove useful also to those called upon to undertake the task of administering justice to a large population where Mussalmans preponderate.

I have included the chapter on Missing Persons in this treatise, which, strictly speaking, does not belong to this volume, as I desire to indicate some of the important changes which have been introduced by the Indian Evidence Act. It was understood

for many years that a missing person could not be held to be dead under Mussalman Law until after the lapse of ninety years from his birth,* but recent decisions on the subject have laid down that such a rule of law was one of evidence only and fell within the purview of the Indian Evidence Act. I am inclined to take the same view with regard to the period of gestation under Mussalman Law,† *viz.*, that it is only a rule of presumption which falls within the scope of the Indian Evidence Act. Thus it is highly important to draw a clear distinction between the rules of substantive Mussalman Law and those which purely belong to the province of adjective Law. The rules of Inheritance, Wakf and Pre-emption are not dealt with here, but should the reception of the present work be sufficiently encouraging, they may form the subject of a separate volume.

References to Sale's Koran have been given and cross-references to the different Articles are quoted at the foot of the page. I have carefully avoided Arabic or technical words, and wherever such words are used, I have given their English equivalents. The General Index along with the Summary of Contents and General Contents will, it is hoped, facilitate any search for references.

No one is more deeply conscious than myself of the defects that may have crept into this work, and I can only urge the numerous calls on my time and energy, apart from the pressure of official work, as an excuse for their presence. But if, in spite of these blemishes, "Institutes of Mussalman Law" serves in any way to lighten the burden of the student or the task of the

* See "Institutes of Mussalman Law," p. 185.

† See *Ibid.*, p. 322.

Bench and the Bar engaged in the practical application of Mussalman Law, I shall deem my labours amply rewarded.

Finally, I desire to record my thanks to various friends for assistance and encouragement; to the late Sir John Scott, for inspiring me with the idea of writing the present treatise; to the late Hon'ble Mr. Justice Gilbert Henderson, for fostering and developing that idea; to the Earl of Cromer for his kindness and courtesy in readily supplying me with necessary books and information; to the Hon'ble Sir John Stanley, Chief Justice, Allahabad High Court, for valuable suggestions and continuous encouragement; to Mr. F. K. Dobbin, Judge, Presidency Court of Small Causes, for the correction of the proofs; to Mr. M. Y. Gauher Ali, Barrister-at-Law, for helping me in translating the French of Kadri Pacha's Mussalman Code into English; and lastly, to Mr. Gerald H. Carey, Barrister-at-Law, Cairo, Egypt, for revising my translations from the French into English.

A. F. M. ABDUR RAHMAN.

16, TOLTOLLAH, CALCUTTA;

July 5, 1907.

CONTENTS OF THE TREATISE.

	PAGE.
PREFACE	vi—xvi
SUMMARY OF CONTENTS	xvii—xviii
GENERAL CONTENTS	xix—xl
TABLE OF CASES CITED	xli—liv
BIBLIOGRAPHY OF WORKS IN THE ORIGINAL ARABIC ...	lv—lxi
CORRIGENDA	lxiii

SUMMARY OF CONTENTS.

BOOK I.—MARRIAGE.

CHAPTER	I.	Proposals of marriage. (Arts. 1-4) ...	1—3
CHAPTER	II.	Conditions requisite for a valid marriage, and the legal effects of marriage. (Arts. 5-18) ..	4—14
CHAPTER	III.	Impediments to marriage. (Arts. 19-32) ...	15—20
CHAPTER	IV.	Guardianship in marriage (<i>Vilayat</i>). (Arts. 33-56)	21—34
CHAPTER	V.	Agency in marriage. (Arts. 57-61) ...	34—36
CHAPTER	VI.	Equality in marriage. (Arts. 62-69) ...	36—39
CHAPTER	VII.	Dower. (Arts. 70-119)	40—73
CHAPTER	VIII.	The marriage of Muslims with Christian women or Jewesses and the nature of the marriages of non-Muslims on their subsequently embracing Islam. (Arts. 120-130)	74—79
CHAPTER	IX.	Void and Invalid Marriages. (Arts. 131-144)	79—87
CHAPTER	X.	Proofs of marriage. (Arts. 145-149) ...	87—90

BOOK II.—RECIPROCAL RIGHTS AND DUTIES OF HUSBAND AND WIFE.

CHAPTER	I.	The husband's duties towards the wife. (Arts. 150-159)	91—94
CHAPTER	II.	The husband's duties towards the wife as regards maintenance. (Arts. 160-205) ..	95—113
CHAPTER	III.	Marital authority. (Arts. 206-211) ...	114—117
CHAPTER	IV.	Rights and Duties of the wife. (Arts. 212-216)	117—123

BOOK III.—DISSOLUTION OF MARRIAGE.				PAGE
CHAPTER	I.	Divorce (<i>Talak</i>). (Arts. 217-272) ...		124—158
CHAPTER	II.	Repudiation by mutual consent of husband and wife in <i>Khula</i> form (Arts. 273-297) ...		158—168
CHAPTER	III.	Separation on account of the husband's impotency. (Arts. 298-302)		169—171
CHAPTER	IV.	Separation on account of apostasy. (Arts. 303- 309)		172—174
CHAPTER	V.	<i>Iddat</i> or term of probation: Maintenance of the wife during <i>Iddat</i> . (Arts. 310-331) ...		174—184

BOOK IV.—CHILDREN.

CHAPTER	I.	Paternity and filiation. (Arts. 332-364) ...		185—204
CHAPTER	II.	The duties of parents towards their children. (Arts. 365-407)		204—226
CHAPTER	III.	Maintenance of parents by their children (Arts. 408- 414)		226—229
CHAPTER	IV.	Maintenance of relations other than ascendants and descendants. (Arts. 415-419) ...		229—231
CHAPTER	V.	Paternal authority (<i>Vilayat</i>). (Arts. 420-434)		231—240

BOOK V.—GIFTS (*Hiba*): WILLS (*Wasaya*): EXECUTORS
(*Wasi*): INHIBITION (*Hajr*): MISSING PERSONS (*Mafkood*).

CHAPTER	I.	Gifts <i>inter vivos</i> (Arts. 435-464) ...		241—271
CHAPTER	II.	Wills. (Arts. 465-505) ...		271—293
CHAPTER	III.	Executor: His powers and duties. (Arts. 506-552)		293—313
CHAPTER	IV.	Inhibition. (<i>Hajr</i>): Legal Incapacity: The age of reason and majority (553-570) ...		313—320
CHAPTER	V.	Missing persons. (Arts. 571-581) ...		320—328

APPENDIX	containing Arabic texts from the original Works			329—474
GENERAL INDEX	... ..			475—532

GENERAL CONTENTS.

BOOK I.

MARRIAGE.

CHAPTER I.

PROPOSALS OF MARRIAGE.

ARTICLE.	PAGE.
1. When a proposal of marriage can be made to a woman	1
2. A proposal of marriage cannot be made to a woman who is observing <i>Iddat</i> ...	2
3. A suitor can see the face and hands of the woman to whom he proposes marriage	3
4. Mere promise of marriage does not constitute marriage	3

CHAPTER II.

CONDITIONS REQUISITE FOR A VALID MARRIAGE, AND THE LEGAL EFFECTS OF MARRIAGE.

5. Declaration and acceptance are essential in a valid marriage	4
6. Both declaration and acceptance must be heard and expressed at the same meeting	6
7. Presence of witnesses essential and the qualifications such witnesses must possess	6
8. One male or two female witnesses necessary when a father gives his adult daughter in marriage	7
9. When a written contract necessary	8
10. Marriage of the dumb	8
11. Marriage valid without settlement of dower	8
12. Marriage subject to a condition	9
13. Temporary or <i>Mutah</i> marriage is void	9
14. Neither party inherits in a temporary marriage	10
15. Marriage by exchange is valid	10
16. Contracting parties cannot reserve option or impose conditions	10
17. Legal effects of marriage	11
18. Effect of marriage contracted without witnesses or legal conditions ...	14

CHAPTER III.

IMPEDIMENTS TO MARRIAGE.

19.	A man cannot have more than four wives at one time	15
20.	There must be no prohibition affecting the marriage parties	16
21.	Perpetual and temporary prohibitions to marriage	15
22.	Prohibited degrees of relationship in marriage	16
23.	Other prohibitions	17
24.	Illicit intercourse constitutes a prohibition to marriage	17
25.	Fosterage produces an impediment to marriage	17
26.	Marriage is not valid with the sister, aunt or niece of a wife that is living ...	18
27.	Marriage is not permissible with a woman observing <i>Iddat</i>	18
28.	Re-marriage with a woman repudiated three times	19
29.	Marriage during pregnancy is unlawful except when the pregnancy is due to illicit intercourse	19
30.	Marriage with a fifth wife is unlawful until one of the four has been repudiated	19
31.	Non-Muslim women who are lawful to Muslims	20
32.	Fire-worshippers, &c., are unlawful	20

CHAPTER IV.

GUARDIANSHIP IN MARRIAGE (*Vilayat*).

QUALIFICATIONS NECESSARY FOR, AND DUTIES OF, A GUARDIAN IN MARRIAGE.

33.	Necessary qualifications of a guardian in marriage	21
34.	Where the intervention of a guardian in marriage is necessary	21
35.	The relations who have the right to intervene as guardians in the marriage of minors and adults who are incapable	22
36.	Guardianship failing <i>Asab</i> relations	22
37.	Guardianship failing any relations	23
38.	Executor cannot interfere in the marriage of wards unless by right of relationship	23
39.	Muslims cannot act as guardians to non-Muslims, except judicially empowered to do so	24
40.	A remote relation has no preference over a near relation in the marriage of minors	24
41.	Where a near relation refuses a proposal, the judge may contract marriage	24
42.	Either of two relations of the same degree may contract a ward in marriage	25
43.	A judge cannot marry a female orphan in his charge	25

MARRIAGE OF MINORS AND OF ADULTS WHO ARE LEGALLY INCOMPETENT.

44.	Power of a father and grandfather with regard to compelling children in marriage	26
45.	Where such marriage remains valid	26

ARTICLE.	PAGE.
46. Where father or grandfather is profligate and occasions loss, marriage is invalid	27
47. Where the guardian contracts the minor in marriage to an unsuitable person	27
48. Wards compelled in marriage have right of cancelling contract at puberty	28
49. How a woman must exercise this right of option	29
50. Effects of her silence at the time option should be exercised	29
51. Every male or female, adult and of sound mind, can marry without a guardian's intervention	30
52. Where a woman marries against the wish of an <i>Asab</i> relation, the latter can impugn the marriage if husband is not suitable or provides inferior dower	31
53. Consent of a woman, virgin or otherwise, is essential and how such consent may be expressed	31
54. Consent of a woman other than a virgin must be expressed in words	32
55. Women who are to be treated as virgins	33
56. Girl wife must not be taken to her husband's house before she is physically fit for sexual intercourse, and in case of dispute must be examined by a matron	33

CHAPTER V.

AGENCY IN MARRIAGE.

57. An agent may be appointed to contract marriage	34
58. Such appointment may be made verbally or in writing	34
59. Agent cannot delegate his power without principal's authority	35
60. Agent is not responsible for delivery of wife to husband nor for dower	35
61. Agent's contract, when it is within scope of his authority, binds the principal	35

CHAPTER VI.

EQUALITY IN MARRIAGE.

62. Husband must be the wife's equal, but wife's inferiority does not render marriage invalid	36
63. Qualifications that constitute equality in marriage	36
64. What constitutes equality in Islam	37
65. Nobility acquired, superior to that which is inherited	37
66. A man able to pay the prompt part of dower and wife's maintenance is the equal of a rich woman	38
67. Equality in respect of virtue or otherwise	38
68. Equality as regards profession or trade	38
69. Ignorance of the husband's condition in life at the time of marriage does not affect its validity, except in the case of misrepresentation	39

CHAPTER VII.

DOWER.

AMOUNT OF DOWER AND THE FIT SUBJECTS OF WHICH DOWER MAY CONSIST.

ARTICLE.	PAGE.
70. Minimum dower	40
71. Of what dower may consist	41
72. Unlawful things cannot be settled as dower	42
73. Prompt and deferred dower	42

THE WIFE'S RIGHT OVER THE DOWER.

74. Wife's right to dower is acquired as soon as marriage is validly contracted	45
75. Husband bound to pay the full amount of dower stipulated	48
76. Cases in which wife is entitled to proper dower ...	49
77. How the wife's proper dower is to be determined ...	49
78. Woman married without dower is entitled to proper dower	50
79. Husband, father or paternal grandfather may make additions to the dower	51
80. Adult wife can remit dower in her husband's favour, but father cannot do so in respect of his minor daughter	52

CIRCUMSTANCES PERFECTING THE WIFE'S RIGHT TO THE FULL DOWER, AND THOSE CAUSING HER TO FORFEIT THE HALF OR THE WHOLE OF THE DOWER.

81. Where dower is due and payable	52
82. What constitutes valid retirement	53
83. Legal effect of valid retirement	53
84. Where a wife, repudiated before consummation, is entitled to half of the dower and any increase to the dower	54
85. Where she is entitled to stipulated dower	55
86. Where wife in lieu of dower is entitled to <i>Mutah</i> or presents	56
87. Where valid retirement does not amount to consummation of marriage ...	56
88. Where guardian cancels a minor's marriage, the wife is not entitled to dower	57
89. Other cases where a wife loses her right to dower or <i>Mutah</i>	57
90. Of what <i>Mutah</i> consists and how payable	58

CONDITIONS IN THE SETTLEMENT OF DOWER.

91. Husband is bound to carry out conditions in the dower	58
92. Payment of dower when wife's virginity is stipulated for	59
93. Where beauty is stipulated for	59
94. Where husband is bound to pay stipulated or proper dower	60

PAYMENT OF DOWER: THE WIFE'S RIGHT OVER THE DOWER.

95. Persons who may receive dower for or on behalf of a minor	60
96. Executors have power to realize dower	60
97. Dower is the wife's sole property	61
98. In case of gift of dower by wife, husband is entitled to half the dower ...	61
99. Wife cannot be forced to relinquish her dower in favour of her husband, guardian or relations	62

SURETYSHIP IN DOWER. LOSS AND CONSUMPTION OF DOWER.
WIFE'S CLAIM TO DOWER.

ARTICLE.	PAGE.
100. Where guardian of minor husband or wife may stand surety for dower ...	63
101. Where surety has been given for dower, wife can claim from either husband or surety	64
102. Where father is liable for dower in respect of his minor son destitute of means	64
103. Wife's claim in respect of dower which is lost	65

DISPUTES RELATING TO DOWER.

104. Wife's claim to prompt dower after she has surrendered herself to her husband	65
105. Where there is a dispute as to dower	66
106. Where wife is entitled to proper dower	66
107. Death of either husband or wife does not alter procedure laid down in preceding Article	67
108. Where proper dower is payable in full and where deductions are to be made	67
109. Where a man, with a view to marriage advances maintenance to a woman observing <i>Iddat</i>	68
110. Where a man makes presents or advances dower to a woman	69
111. Where disputes arise between husband and wife as to intention with the husband with which the husband gave sums of money or other movable property	69

THE WIFE'S MARRIAGE OUTFIT: THE HOUSEHOLD EFFECTS, AND DISPUTES
RELATING THERETO.

112. Wife herself is not obliged to pay for her marriage outfit	70
113. Where father makes a present of marriage outfit to his adult daughter ...	71
114. Where father purchases his minor daughter's marriage outfit	71
115. Where father purchases marriage outfit from his daughter's dower	71
116. Marriage outfit is the exclusive property of the wife	72
117. Where there is a dispute as to the marriage outfit	72
118. Articles that belong to the husband and wife in case of dispute after marriage	73
119. In case of dispute after death of either husband or wife	73

CHAPTER VIII.

THE MARRIAGE OF MUSLIMS WITH CHRISTIAN WOMEN OR
JEWESSES, AND THE NATURE OF THE MARRIAGES
OF NON-MUSLIMS ON THEIR SUBSEQUENTLY
EMBRACING ISLAM.

THE MARRIAGE OF MUSLIMS WITH CHRISTIAN WOMEN AND JEWESSES.

120. Where Muslim may marry Christians or Jewesses	74
121. A Muslim with a Muslim wife may also take to a Christian or Jewish wife at the same time	74

ARTICLE	PAGE
122. A Muslim woman can only marry a Muslim husband	75
123. Where a Christian wife becomes a Jewess	75
124. Children follow their father's religion	75
125. Differences of religion deprives husband of his right to a wife's estate and <i>vice versa</i>	76

MARRIAGES BETWEEN NON-MUSLIMS, WHERE BOTH OR ONE OF THE PARTIES
EMBRACE ISLAM.

126. Where the wife of a non-Muslim embraces Islam	76
127. Where the husband of a non-Muslim wife embraces Islam	77
128. Where both husband and wife embrace Islam together	78
129. Religion of children when husband or wife embraces Islam	78
130. Where children are to embrace Islam	78

CHAPTER IX.

VOID AND INVALID MARRIAGES.

VOID MARRIAGES.

131. Ties of consanguinity, affinity or fosterage, render a marriage void ...	79
132. Marriage with a woman already married, or in <i>Iddat</i> , is also void...	80
133. Marriage with two sisters under one contract is void, and circumstances under which one marriage is valid	80
134. Marriages which are absolutely void	82
135. Legal effects of the foregoing void marriages	83
136. Where two guardians, acting independently of each other, give their ward in marriage	83
137. Where guardian's marriage with his adult ward is void	83

INVALID MARRIAGES.

138. Ratification of guardian necessary where minor contracts marriage ...	84
139. Where a remote relation contracts marriage when there is a nearer relation	84
140. Cases in which marriage is contracted by an agent	85
141. Ratification of marriage by principal	85
142. Where marriage contracted by agent is not binding upon a woman ...	86
143. Marriage under misrepresentation	87
144. Marriage contracted by a person without authority	87

CHAPTER X.

PROOFS OF MARRIAGE.

145. How marriage is proved	87
146. Witnesses who are descendants of the parties	88
147. Guardian's testimony..	88
148. Where a man acknowledges a woman as wife	88
149. Where a woman acknowledges a man as husband	90

BOOK II.

RECIPROCAL RIGHTS AND DUTIES OF HUSBAND AND WIFE.

CHAPTER I.

THE HUSBAND'S DUTIES TOWARDS THE WIFE.

ARTICLE.	PAGE.
150. Husband's treatment of wife	91
151. His cohabitation with her	91
152. Equality of treatment of several wives	92
153. Such equality of treatment obligatory under all circumstances	92
154. Husband must partition his nights equally among his wives	92
155. He must not favour one wife to the prejudice of another... ..	92
156. One wife may abandon her rights in favour of a co-wife	93
157. On a journey equal partition not necessary	93
158. Where the husband is ill	93
159. Wife's remedy in case of her husband's unjust treatment	94

CHAPTER II.

THE HUSBAND'S DUTIES TOWARDS THE WIFE AS REGARDS
MAINTENANCE.

WIVES ENTITLED TO MAINTENANCE

160. Wife entitled to maintenance when husband is too young to fulfil the duties of marriage	95
161. She is entitled to maintenance while residing in her father's house... ..	95
162. Other cases where maintenance is due to the wife	96
163. Maintenance of a sick wife	96
164. Maintenance of a wife during her husband's imprisonment	96
165. Where husband is bound to maintain his wife's servants	97

WIVES NOT ENTITLED TO MAINTENANCE

166. Maintenance not due to child wife	97
167. Sick wife whose marriage is not consummated is not entitled to maintenance	98
168. Wife on journey unaccompanied by husband, is not entitled to maintenance	98
169. Maintenance of wife engaged in independent profession	98
170. Wife during her imprisonment is not entitled to maintenance	99
171. Rebellious wife, and her maintenance	99
172. Maintenance of wife where marriage is void	99

RULES REGULATING THE AMOUNT OF A WIFE'S MAINTENANCE.

ARTICLE.	PAGE.
173. Scale of wife's maintenance	100
174. How maintenance shall be paid	101
175. Period at which maintenance is payable, must be regulated by husband's calling	101
176. Where husband fails to maintain his wife properly	101
177. Where husband is in straitened circumstances	102
178. Where wife may demand surety for maintenance	103
179. Where maintenance may be modified	103
180. Where wife is entitled to wages from the husband	104

CLOTHING AND LODGING.

181. Husband bound to provide his wife with clothing	104
182. It may be settled in kind or money	104
183. Where wife can claim a new garment	104
184. Where husband must provide his wife with a separate dwelling or apartment	105
185. Husband cannot compel wife to provide lodging for his relations or children by another wife and <i>vice versa</i>	105
186. Where a wife can claim to be removed to another dwelling.	105
187. Where husband is bound to provide another dwelling or a companion for his wife	106
188. Articles a husband is bound to provide for his wife	106

WIFE'S MAINTENANCE WHEN THE HUSBAND IS ABSENT.

189. Wife's maintenance where husband is absent and has left effects	107
190. Where absent husband has left no effects	108
191. Where husband advanced maintenance before he left	108
192. Where husband denies the marriage	108
193. Where he proves that the marriage was dissolved	109
194. Where the judge directs the wife to obtain maintenance from a debt or deposit	109
195. Where the husband has left movable and immovable property	109
196. Where it is lawful for a wife to take maintenance without a judge's order	110

DEBTS FOR MAINTENANCE.

197. Maintenance payable before debts	110
198. Where maintenance is treated as a debt	110
199. Where maintenance is not subject to law of limitation	111
200. Where wife cannot recover maintenance when a month has elapsed	111
201. Where claim to arrears of maintenance is extinguished	111
202. Maintenance judicially decreed remains a debt against the husband	112
203. Where father or husband advances maintenance	112
204. Where wife may release her husband from paying maintenance	113
205. Where maintenance may be set off against another debt	113

CHAPTER III.

MARITAL AUTHORITY.

ARTICLE.	PAGE.
206. Husband's authority in respect of wife's property and wife's power of disposition of same	114
207. Husband's rights over the wife after he has paid the prompt-part of dower	114
208. Where a husband may compel his wife to follow him on a journey ...	115
209. Husband may punish wife in moderation, but must not use violence towards her	115
210. Judge may refer disputes between husband and wife to arbitration ...	116
211. Husband liable to punishment for using violence towards his wife ...	117

CHAPTER IV.

RIGHTS AND DUTIES OF THE WIFE.

212. Wife's duties towards her husband after he has paid prompt portion of dower	117
213. Wife may refuse her person until prompt dower is paid in full ...	117
214. Where wife may leave her husband's house without his permission ...	122
215. Wife entitled to visit her relations	122
216. Wife may attend her sick father without husband's consent ...	123

BOOK III.

DISSOLUTION OF MARRIAGE.

CHAPTER I.

DIVORCE (*Talak*).

POWER TO PRONOUNCE REPUDIATION : WIVES WHO CAN BE REPUDIATED :
NUMBER OF REPUDIATIONS.

217. Where husband may dissolve marriage by repudiation	124
218. Where repudiation pronounced during intoxication is valid ...	125
219. Repudiation by dumb man	125
220. Where husband is incapable of pronouncing a valid repudiation ...	126
221. Minor's father, or minor himself cannot repudiate the minor wife ...	126
222. Repudiation may be expressed verbally or in writing	126
223. Cases where a wife may be repudiated	128
224. Number of repudiations	128
225. Use of special words necessary. Express or implied formulas ...	129

DIFFERENT KINDS OF REPUDIATIONS (<i>Raji</i> AND <i>Bain</i>).						PAGE.
ARTICLE.						
226.	Different kinds of repudiation	...	...	...	...	131
(1) REVOCABLE REPUDIATION (<i>RAJI</i>) AND ITS LEGAL EFFECTS.						
227.	When a repudiation is revocable	...	...	...	...	131
228.	Expressions involving a revocable repudiation	...	...	...	...	132
229.	Expressions involving a repudiation by implication	...	...	...	...	132
230.	Marriage not dissolved until <i>Iddat</i> is completed	...	...	...	...	132
231.	Where husband can take his wife back during <i>Iddat</i>	...	...	...	...	133
232.	How the right of return is to be exercised	...	...	...	...	134
233.	What constitutes a valid return	...	...	...	...	134
234.	Husband must inform wife that he has exercised right of return	...	...	...	...	134
235.	When the right of return ceases	...	...	...	...	135
236.	Where there is a dispute as to expiration of <i>Iddat</i>	...	...	...	...	135
237.	Where the taking back of wife does not annul previous repudiations	...	...	...	...	136
238.	Where deferred part of dower is payable after a revocable repudiation	...	...	...	...	136
(II) IRRECOVERABLE REPUDIATION (<i>BAIN</i>), PERFECT OR IMPERFECT.						
239.	When repudiation is irrevocable (<i>Bain</i>)	...	...	...	...	137
240.	Every repudiation made before consummation of marriage, is irrevocable...	...	...	...	...	137
241.	Where a revocable repudiation becomes irrevocable	...	...	...	...	138
242.	Repudiation with compensation is irrevocable	...	...	...	...	138
243.	Expressions that constitute an irrevocable repudiation	...	...	...	...	139
244.	All expressions other than those mentioned in Art. 229, effect an irrevocable repudiation	...	...	...	...	139
245.	Where a vow of continence effects an irrevocable repudiation	...	...	...	...	139
246.	Legal effects of irrevocable repudiation	...	...	...	...	140
247.	Where husband can remarry a wife repudiated twice	...	...	...	...	141
248.	Legal effects of a final or triple repudiation	...	...	...	...	141
249.	Legal effects of re-marriage	...	...	...	...	142
250.	Repudiation does not affect a woman whose marriage is void	...	...	...	...	143
CONDITIONAL REPUDIATION.						
251.	Repudiation may be unconditional or conditional	...	...	...	...	143
252.	Repudiation to take effect at a future time explained	...	...	...	...	144
253.	Where such repudiation takes effect	...	...	...	...	144
254.	Effect of conditional repudiation	...	...	...	...	145
255.	Where conditional repudiation is nullified	...	...	...	...	145
256.	Where conditions are realized	...	...	...	...	146
257.	Effect of husband's oath	...	...	...	...	146
258.	Where repudiation is subject to two conditions	...	...	...	...	147
259.	Effect of wife's declaration	...	...	...	...	147
REPUDIATION SUBJECT TO WIFE'S CONSENT : WIFE'S POWER TO REPUDIATE HERSELF (<i>Tafweez</i>).						
260.	Husband can pronounce repudiation himself or empower his wife to do so	...	...	...	...	147

ARTICLE.	PAGE.
261. Where wife is empowered to choose between maintenance and repudiation...	148
262. Where a single irrevocable repudiation operates	149
263. Where a revocable repudiation takes effect	149
264. Where the wife exceeds her authority in the number of repudiation ...	149
265. Where the wife does not adhere to the form of repudiation authorized ...	150

REPUDIATION DURING ILLNESS.

266. Repudiation during illness	150
267. Repudiation in other cases	154
268. Repudiation by persons suffering from phthisis, paralysis, &c.	154
269. Effects of an irrevocable repudiation during husband's illness, and wife's right to inheritance on husband's death	155
270. Cases in which a wife repudiated during her husband's last illness, is entitled to her share in his estate	156
271. Cases in which a wife is not entitled to inherit	157
272. Where husband is entitled to his share in wife's estate when she has brought about the dissolution of marriage	158

CHAPTER II.

REPUDIATION BY MUTUAL CONSENT OF HUSBAND AND WIFE IN KHULA FORMS.

273. Dissolution of marriage by repudiation and by <i>Khula</i> form	158
274. Conditions necessary in a <i>Khula</i> repudiation	159
275. Where <i>Khula</i> repudiation is validly effected	159
276. Husband can pay compensation of greater amount than dower	160
277. Fit subject for compensation	160
278. Where <i>Khula</i> repudiation is equivalent to an irrevocable repudiation ...	160
279. Where the proposal of <i>Khula</i> repudiation emanates from the husband ...	160
280. Where it emanates from the wife	161
281. Effects of <i>Khula</i> repudiation with compensation	161
282. Where there is no compensation	162
283. Where the dower is compensation for <i>Khula</i> repudiation	162
284. Where husband is not released from his liability to pay maintenance ...	163
285. Where compensation perishes before delivery	163
286. Where wife undertakes at her own expense to suckle and maintain a child	163
287. Where wife undertakes to maintain her children until they are of age ...	164
288. Rights of husband and wife as to the custody of their children	164
289. Where husband is bound to furnish child's maintenance	165
290. <i>Khula</i> repudiation in respect of minors	165
291. Where husband offers <i>Khula</i> repudiation to his minor wife conditionally upon her providing compensation	166
292. Father has no power to accept <i>Khula</i> repudiation on behalf of his minor son	167

ARTICLE.	PAGE.
293. <i>Khula</i> repudiation by wife legally incompetent... ..	167
294. Effects of <i>Khula</i> repudiation offered by wife during last illness	167
295. Liability of agent for compensation in <i>Khula</i> repudiation	168
296. When compensation is payable	168
297. Compensation where marriage is void	168

CHAPTER III.

SEPARATION ON ACCOUNT OF THE HUSBAND'S IMPOTENCY.

298. Where wife is entitled to demand separation for impotency	169
299. Where the judge is to grant postponement for a year	169
300. Where the judge is to pronounce separation	170
301. Where the husband denies the wife's allegation of impotency	170
302. Effects of separation for impotency	171

CHAPTER IV.

SEPARATION ON ACCOUNT OF APOSTASY.

303. Separation when either husband or wife apostatizes	172
304. Legal effects of such separation	172
305. Where husband and wife apostatize at the same time	172
306. Where apostasy takes place after consummation of marriage	173
307. Where it precedes consummation	173
308. Wife's right to inherit from her deceased husband who apostatized	173
309. Husband's right to inherit from his wife who apostatizes in her last illness	174

CHAPTER V.

IDDAT OR TERMS OF PROBATION: MAINTENANCE OF THE DURING IDDAT.

WIVES SUBJECTED TO IDDAT.

310. Cases in which <i>Iddat</i> is incumbent	174
311. For women who have not attained puberty	175
312. Period of <i>Iddat</i> for women who have attained puberty	176
313. Where wife repudiated before she has reached the age of puberty	176
314. How "change of life" affects <i>Iddat</i>	177
315. Where a woman must observe <i>Iddat</i> for seven months	177
316. <i>Iddat</i> of a pregnant woman	178
317. <i>Iddat</i> for a widow	178
318. Where husband dies during wife's <i>Iddat</i> consequent upon a revocable repudiation	178

ARTICLE.	PAGE.
319. Where wife against her will is repudiated under an irrevocable form during her husband's last illness	178
320. Effects of re-marriage during <i>Iddat</i>	179
321. Date from which <i>Iddat</i> commences	179
322. Place in which <i>Iddat</i> must be observed	180
323. Cases in which <i>Iddat</i> is not incumbent... ..	180

WOMEN ENTITLED TO MAINTENANCE DURING THE PERIOD OF *IDDAT*.

324. Cases in which wife is entitled to maintenance during <i>Iddat</i>	181
325. Cases where wife does not lose her right to maintenance after dissolution of marriage	182
326. Cases where wife forfeits her right to maintenance during <i>Iddat</i>	182
327. Where wife loses her right to maintenance for having changed her religion	183
328. Other cases where wife is entitled to maintenance	183
329. Where maintenance has not been fixed by judge	184
330. Where maintenance is fixed by mutual agreement	184
331. Widow is not entitled to maintenance	184

BOOK IV.

CHILDREN.

CHAPTER I.

PATERNITY AND FILIATION.

CHILDREN BORN OF A VALID MARRIAGE.

332. Recognized periods of gestation	185
333. Child born six full months from the date of a valid marriage	185
334. Where husband denies legitimacy of a child born after six full months from date of marriage	186
335. Conditions necessary for husband and wife to demand oath of <i>lian</i> ...	186
336. Where husband can disown a child	187
337. Cases where a child cannot be held illegitimate even after husband and wife have been judicially separated... ..	188
338. Legal status of illegitimate child	188
339. Where father acknowledges child of his dead and disowned son	189
340. Effect of separation consequent upon oath of <i>lian</i>	189

CHILDREN BORN OF A VOID MARRIAGE.

341. Paternity of a child born before parties are separated in a marriage radically void	190
342. Paternity of a child born of cohabitation by mistake	190
343. Paternity of a child born of a seduced woman	190

CHILDREN BORN TO REPUDIATED WIVES OR TO WIDOWS.

ARTICLE.	PAGE.
344. Paternity of a child born of a woman observing <i>Iddat</i> consequent upon a revocable repudiation	191
345. Paternity of a child born of a widow observing <i>Iddat</i> or a repudiated wife	191
346. Case of young wife not subject to menstruation who becomes pregnant during <i>Iddat</i>	192
347. Where a young wife not subject to menstruation becomes a widow and bears a child within ten months and ten days of her husband's death...	193

PROOF OF BIRTH : ACKNOWLEDGMENT OF PATERNITY, FILIATION AND FRATERNITY.

348. Where a married woman claims to have given birth to a child	194
349. When a woman observing <i>Iddat</i> asserts that she bore a child within two years	194
350. Where a man acknowledges as his son a child of unknown parentage ...	195
351. Where a woman acknowledges a child of unknown parentage ...	199
352. Where a child of either sex acknowledges a man as father or a woman as mother	199
353. Where a man acknowledges another man as brother	200
354. A child of known parentage cannot be validly acknowledged ...	200
355. Testimony necessary to establish relationship	200

FOUNDLINGS (*Lakeet*).

356. A foundling when discovered should be taken care of	201
357. Every foundling is held to be a Muslim except when found in a Christian or Jewish quarter	201
358. Rights of persons over foundling	201
359. Property on the foundling is the child's own	202
360. Responsibilities of a person sheltering a foundling	202
361. Acknowledgment of a foundling that is living	202
362. Where two persons lay claim to a foundling	203
363. Where a married woman acknowledges a foundling	203
364. Where a foundling is destitute and acknowledged by nobody, responsibility for its maintenance falls on the State	203

CHAPTER II.

THE DUTIES OF PARENTS TOWARDS THEIR CHILDREN.

365. Father must educate his children with due regard to his condition in life	204
--	-----

SUCKLING (*Razaat*).

366. Cases where a mother is bound to suckle her child herself	204
367. Case in which father is bound to provide a wet-nurse	205
368. Where a mother is entitled to remuneration for suckling child	205
369. Suckling during <i>Iddat</i>	205

ARTICLE.	PAGE.
370. Suckling after expiry of <i>Iddat</i>	206
371. Where a mother is engaged to suckle her child ..	206
372. Where remuneration for suckling is compounded for ...	206
373. Remuneration for suckling not lost by father's death ...	207
374. Where a hired wet-nurse may be compelled to renew her agreement ...	207

FOSTERAGE AND THE IMPEDIMENTS TO MARRIAGE ARISING THEREFROM.

375. Fosterage an impediment to marriage	207
376. Effects of suckling as regards prohibition of marriage ...	208
377. Persons affected by fosterage	208
378. Where a man has two wives and one suckles the other ...	209
379. How fosterage is established	209

Hazarah OR CUSTODY OF THE CHILD.

380. A mother is entitled to the custody of her children	210
381. Except when there is an apprehension of change of religion ...	211
382. Qualifications necessary to exercise the right of custody in respect of a child	211
383. How such right is forfeited	211
384. Persons entitled to custody of child in default of mother ...	213
385. Women are preferred to men	213
386. Where there are no male paternal or <i>asab</i> relations ...	214
387. Where a woman refuses to take custody of the child ...	215
388. Costs in regard to a child's custody	215
389. Where mother is not entitled to remuneration for the custody of her child	216
390. Where both the father and child are without means	216
391. Age at which custody of a boy or girl ceases	216
392. Custodian's right in respect of the child	219
393. Wife's right to remove child during and after <i>Iddat</i> consequent upon repudiation	219
394. No custodian except mother can remove child without father's consent ...	220

THE DUTIES OF A FATHER WITH REGARD TO THE MAINTENANCE OF CHILDREN.

395. Duties of a father towards his children	220
396. Where father must provide maintenance for his adult son ...	221
397. Where father is responsible for his children's maintenance ...	221
398. Where father is poor but in good health	222
399. Where the mother becomes responsible for the maintenance of her children	222
400. Where near relations become responsible for children's maintenance ...	222
401. Where the ascendants become responsible before collateral relations ...	223
402. Where the father is missing	224
403. A father is not responsible for maintenance of his minor son's wife ...	224
404. Where father can set his minor son to employment	225
405. Where the sum paid for child's maintenance is inadequate, the judge shall fix the amount... ..	225
406. Mother may come to an agreement as regards maintenance	226
407. Debt for maintenance judicially decreed	226

CHAPTER III.

MAINTENANCE OF PARENTS BY THEIR CHILDREN.

ARTICLE.	PAGE,
408. Children responsible for maintenance of their ascendants without means ...	226
409. Where father is unable to look after himself, child must furnish a servant's maintenance	227
410. Where mother marries a second time her maintenance is not incumbent on child	227
411. Maintenance of poor parents incumbent upon the child ...	227
412. Maintenance of poor parents when child is missing but has left property behind	228
413. Where maintenance falls upon the Public Treasury ...	228
414. Proportion of maintenance due in respect of poor relations ...	228

CHAPTER IV.

MAINTENANCE OF RELATIONS OTHER THAN ASCENDANTS
AND DESCENDANTS.

415. Liability of maintenance is distributed among relations within prohibited degrees	229
416. Difference of religion does away with obligation of maintenance ...	230
417. Obligation of maintenance rests first with the relation with whom marriage is prohibited	230
418. Where there are several relations they contribute proportionately to their shares in the inheritance	230
419. Where debt for maintenance in respect of distant relations is extinguished	231

CHAPTER V.

PATERNAL AUTHORITY (*Vilayat*).

420. Father's authority over his children	231
421. Such authority exists even when child reaches majority and is insane ...	232
422. How a father can deal with the property of his children... ..	232
423. Where a child on attaining puberty can rescind contracts made on its behalf by the father	236
424. Where father being bad administrator sells his child's property ...	236
425. Where father misapplies the property of his minor child ...	236
426. Father can buy his minor children's property and sell his property to them	237
427. Father as guardian can deal with his child's goods by way of loan and security	237
428. Father himself cannot lend, borrow or make a gift of minor child's property	238
429. Where father cannot agree to the assignment of a debt of his minor child	238
430. Father's claim to sums paid for articles during minority ...	238
431. Son may at once claim property specified as his before father's death ...	239
432. Where a child sues father for property consumed during minority ...	239

ARTICLE	PAGE.
433. Where a poor father can sell the property of absent child to provide maintenance	239
434. Guardianship after father's death	239

BOOK V.

GIFTS (*HIBA*): WILLS (*WASIYA*): EXECUTORS (*WASI*): INHIBITION (*HAJR*): MISSING PERSONS (*MAFKOOD*).

CHAPTER I.

GIFTS *INTER VIVOS*.

REQUISITE CONDITIONS FOR THE VALIDITY OF A GIFT.

435. What completes a gift	241
436. Qualifications necessary in the donor	245
437. How ownership is transferred	247
438. Persons to whom a gift may be made	250
439. Of what a gift may consist	250

PROPERTY THAT MAY BE LAWFULLY GIVEN.

440. Gift of undivided share in property (<i>Musha</i>)	252
441. How ownership is transferred in a gift of an undivided share of divisible property	254
442. Where the property is joined to other property of the donor but is capable of being divided	256
443. Gift of that which is not considered to have a separate existence	257
444. Gift of an undivided share in divisible property is only valid when made with the consent of all the co-owners	258
445. Creditor can validly make a gift of his debt to the debtor	258
446. When gift of a debt to any body but the debtor is void	258

PERSONS CAPABLE OF RECEIVING A GIFT.

447. A gift to a minor by guardian is complete by the mere act of giving	259
448. Any person having legal authority over a minor may take possession of a gift made in minor's favour	261
449. Husband can validly receive a gift made in favour of his minor wife	262

REVOCATION OF GIFTS

450. Where a donor can revoke a gift	262
451. Revocation of gift where there is increase in the gift itself	262
452. Death of either party after delivery of gift bars the right of revocation	263
453. Right of revocation is also forfeited if the donee has disposed of the gift	263
454. Gift by husband to wife and <i>vice versa</i>	264

ARTICLE.	PAGE.
455. Irrevocable gifts	266
456. Right of revocation is forfeited if gift is lost while in donee's possession ...	266
457. Gift cannot be revoked where it is made with compensation (<i>ewaz</i>) ...	267
458. Where donor is deprived of the compensation	268
459. Where gift perishes	269
460. Father cannot pay compensation out of his minor child's property ...	269
461. A gift in favour of a poor man is irrevocable	269
462. How revocation is effected	269
463. Where gift is made with compensation... ..	270
464. A charitable gift is like an ordinary gift	271

CHAPTER II.

WILLS.

THE NATURE OF A WILL : THE CONDITIONS REQUISITE FOR ITS VALIDITY : PERSONS CAPABLE OF MAKING A WILL.

465. Definition of a will	274
466. An adult person can make a will	273
467. When bequests of a prodigal are valid	274
468. What property can be bequeathed	274
469. Where the whole of testator's property may be bequeathed to a single person	271
470. When a bequest made by a person in debt to the full amount of his estate is valid	275
471. When a bequest in favour of an heir is valid	275
472. Where a person can bequeath one-third of his property to a stranger ...	276
473. Husband and wife can bequeath to each other	278
474. Where bequest made in favour of a person who caused the death of testator is void	279
475. Where bequest made in favour of a child in the womb is valid	279
476. Charitable bequests are valid	280
477. Difference of religion does not render a bequest invalid	281
478. A bequest must be accepted subsequent to the testator's death	281
479. Circumstances connected with the revocation of a bequest	282
480. Denial of a bequest does not constitute revocation	282
481. Testator is not responsible for the loss of object of bequest while in his possession	282

RIGHTS OF THE LEGATEE.

482. A testator having heirs can only dispose of one-third of his property by way of bequest	283
483. Where two equal legacies are bequeathed which together exceed one-third of the estate	283
484. Where testator bequeaths an unspecified share subject to variation ...	284

ARTICLE.	PAGE.
485. Where one-third of property is bequeathed to two persons one of whom was dead at the time the bequest was made	284
486. When testator bequeaths a thing definite and specified and two-thirds of the object forming the bequest perish	285
487. Where testator bequeaths a specified sum and there is a debt against the estate	285

REQUESTS OF USE AND PRODUCE OF PROPERTY FOR A LIMITED PERIOD.

488. Where testator bequeaths right of residence in or the rents of house ...	286
489. Where testator bequeaths the use or produce of immovable property not exceeding one-third of his estate	286
490. Right of legatee in bequests of use and produce of property	287
491. Legatee's right to standing crop	287
492. Legatee's right when produce of land is bequeathed without mention of any period	288
493. Usufruct of property may be bequeathed to one person and the property itself to another	288

DEATH-BED GIFTS AND TRANSACTIONS BY THE SICK.

494. Unconditional gift is valid to the extent of the whole property if made in good health	289
495. When bequests are valid only to the extent of a third of the estate ...	289
496. Where transactions of a gratuitous nature are valid	289
497. Where gifts made by cripples, paralytics and consumptives are valid ...	289
498. Where a person in last illness acknowledges a debt in favour of another who is not his heir	290
499. Where a sick person acknowledges a debt in favour of an heir	290
500. How the status of heir is to be determined	290
501. Where a man in his last illness acknowledges a debt made in favour of a wife whom in that illness he has irrevocably repudiated	291
502. Release of a debt in last illness is void if testator is in debt himself to the full extent of his estate	291
503. Where wife in last illness remits a debt... ..	291
504. Debt takes precedence over a legacy and a legacy over a share in the inheritance	292
505. Debts which cannot validly be paid during last illness	292

CHAPTER III.

THE EXECUTOR: HIS POWER AND DUTIES.

THE EXECUTOR.

506. Where a person accepts executorship during testator's life-time ...	293
507. Refusal to become executor	293
508. Where after refusal office cannot be accepted	294

ARTICLE.	PAGE.
509. Where executor before testator's death neither accepts nor refuses	294
510. Tacit acceptance equivalent to express acceptance	294
511. Testator cannot restrict executor to certain specified acts	295
512. Persons who may be appointed as executors	295
513. Executor appointed by father takes precedence over paternal grandfather	295
514. Qualifications necessary for an executor	296
515. Testator can always revoke executorship	296
516. Executor so long as he is trustworthy cannot be removed	297
517. Where a man dies appointing no executor and leaving no heirs the judge will appoint an executor	297
518. Cases in which joint executors can act independently of each other	298
519. Where two executors are appointed and only one accepts	298
520. Where deceased appoints executor who in his turn appoints an executor	299

POWERS AND DUTIES OF EXECUTORS.

521. Cases where the executor can dispose of a minor's property	299
522. Where the consent of the heirs is necessary before the executor can dispose of any of the property	301
523. Where the executor can dispose of movable and immovable property of the heirs...	302
524. Procedure when the estate is encumbered	302
525. Paternal grandfather cannot sell any property to pay the debts or legacies of the deceased without sanction of the judge	303
526. Power of the executor appointed by a mother	303
527. Powers of the executor as regards the application of minor's property	304
528. Powers of the executor as regards the sale of minor's property	304
529. Where executor can allow a reasonable time for payment	305
530. Where executor can sell his own property to minor and buy minor's property	305
531. Powers of the executor as regards giving or lending minor's property	306
532. Executor can delegate his powers to another person	306
533. Executor cannot release a debtor from a debt due to the estate	306
534. Circumstances in which an executor can compound a debt due to the estate	307
535. Executor's admission of a debt is void	307
536. Where an heir's acknowledgment of a debt due by the deceased is binding	307
537. Executor must provide reasonable maintenance for his ward	307
538. Where executor from his own funds advances ward's maintenance	308
539. Responsibility of executor for paying debt due by the deceased's estate	308
540. Executor without means can claim salary	309
541. Minor on reaching majority can demand from the executor an account of the latter's administration	309
542. Minor's claim against deceased executor's estate	309
543. Where the executor's sworn declaration as to his acts is sufficient	309
544. Where it is not sufficient	310
545. Executor's false statements must be rejected	310

ARTICLE.	PAGE
546. Where executor's declaration as to expenditure may or may not be accepted	310
547. Executor cannot deliver property to ward unless satisfied of the latter's ability to administer it properly	311
548. Where minor upon attaining majority cannot be interfered with in the administration of his property	311
549. Property is not to be delivered to a minor who upon attaining majority shows signs of extravagance	311
550. Executor becomes responsible for property delivered to minor who is unfit to administer it	312
551. Executor is not responsible for delivering property to a minor who shows capacity for good management	312
552. Disputes on minor's attaining majority and fitness for management ...	312

CHAPTER IV.

INHIBITION (HAJR), LEGAL INCAPACITY, THE AGE OF REASON AND MAJORITY.

INHIBITION (HAJR), LEGAL INCAPACITY.

553. Persons who are legally incapable	313
554. Where the acts of a minor and of a lunatic are valid	313
555. Such acts if prejudicial to the minor or lunatic are void even if approved by guardian	314
556. Such acts if profitable to the minor or lunatic are valid even if not approved by guardian	314
557. Where the acts of a lunatic or of a minor are valid when ratified by guardian	314
558. Minor and lunatic are responsible for offences against persons or property	315
559. Cases where the minor is not responsible for transactions entered into without the guardian's sanction	315
560. A prodigal is to be declared incompetent by the judge	316
561. Acts which cannot be repudiated by a prodigal	316
662. Persons who mislead people should be prohibited from following their occupations	317
663. Where a guardian can authorize a minor to engage in trade	317
564. Transactions that a minor authorized to trade may undertake	317

THE AGE OF REASON, ADOLESCENCE AND MAJORITY.

565. The age of reason and of adolescence	318
566. How the age of puberty is to be determined	318
567. At the age of puberty guardianship ceases	319
568. Before puberty minor cannot choose between father and mother ...	319
569. But a boy may do so at puberty	319

ARTICLE.	PAGE.
570. A girl has no option but must be placed under the guardianship of father or paternal grandfather	319

CHAPTER V.

MISSING PERSONS.

571. Where a person is held to be missing in law	320
572. Where the missing person has appointed an agent	32
573. Where he has not done so	321
574. Where the judge has power to order the sale of his property when such property is liable to deteriorate	321
575. Administrator has power to provide maintenance for his relations ...	321
576. A missing person is presumed to be alive in matters which affect him prejudicially	322
577. Where he is presumed to be non-existent in matters prejudicial to others ...	322
578. Where he is held to be dead where his contemporaries have all died ...	322
579. Procedure where a missing person has been declared dead by judge ...	327
580. Where a missing person is discovered to be in existence or returns ...	327
581. Procedure to be adopted where wife, heirs, or debtors of a missing person claim that he is dead	327

TABLE OF CASES CITED.

A.

	PAGE.
A (the wife) v. B (the husband) (I. L. R., 21 Bom., 77) ...	99, 130, 169
Abasi v. Dunne (I. L. R., 1 All. 598)	218
Abbasi Begum v. Nanhi Begum (I. L. R., 18 All. 206) ...	45
Abdool Futteh v. Zabunessa Khatun (I. L. R., 6 Cal., 631)	102, 111
Abdul Ali Ishmailji, <i>In re</i> (I. L. R., 7 Bom., 180) ...	130, 141
Abdul Bari v. Rash Behari Pal (6 C. L. R., 415)	234
Abdul Cadur Haji Mahomed v. C. A. Turner (I. L. R., 9 Bom., 158)	273-274, 280
Abdul Kadir v. Salima (I. L. R., 8 All., 149, F.B.) 5, 12, 13, 34, 41, 116, 119-121	116, 119-121
Abdul Karim v. Fazilat-un-nissa (5 Sel. Rep., S. D. A., 90)	41, 55, 118
Abdul Karim Khan v. Abdul Qayum Khan (I. L. R., 28 All., 343)	277
Abdul Razaek v. Aga Mahomed Jaffer Bindaneem (I. R., 21 I. A., 56) 20, 75, 198	20, 75, 198
Abdul Sarang v. Puttee Bibi (I. L. R., 29 Cal., 738) ...	235
Abdul Shukkoar v. Raheemoon-nissa (6 N.-W. P., H. C. R., 94) ...	118
Abdul Wahab v. Hingu (5 Sel. Rep., S. D. A., 238) ...	159
Abdur Rohoman v. Sakhina (I. L. R., 5 Cal., 558) ...	12, 91
Abedoonissa v. Ameeroonissa (9 W. R., 257) ...	247, 279
Abhassi Begum v. Rajroop Koonwar (I. L. R., 4 Cal., 33) ..	234
Aesha v. Aesha (1 Borr. S. D. A., Bom. 339)	278
Aga Mahomed Jaffer Bindanira v. Koolsom Beebee (I. L. R., 25 Cal., 9, P. C.)	244, 272, 289
Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy (I. L. R., 6 Bom., 703)	301
Ahmed Husain v. Khadija (3 B. L. R., A. C., 28) ...	9, 44

	PAGE.
Ahmud Ollah <i>v.</i> Fueza Beebee (1 Sel. Rep., S. D. A., 381) ...	52
Aiman Bibi <i>v.</i> Ibrahim (5 Sel. Rep., 355) ...	250
Akhtaroon-nissa <i>v.</i> Shariutoollah (7 W. R., 268) ...	142
Aklemannissa Bibi <i>v.</i> Mahomed Hatem (I. L. R., 31 Cal., 849) ...	5, 6, 34, 122
Alabi Koya <i>v.</i> Mussa Koya (I. L. R., 24 Mad., 513) ...	254
Ali Baksh <i>v.</i> Kaim Beebee (1 Sel. Rep., S. D. A., 110) ...	47, 63
Ali Mahomed Khan <i>v.</i> Azizullah Khan (I. L. R., 6 All., 50) ...	47, 63
Aleemodeen Moallem <i>v.</i> Syfoora Bibee (6 W. R., 125) ...	217
Amanat-un-nissa <i>v.</i> Bashir-un-nissa (I. L. R., 17 All., 77) ...	46
Amba Shankar <i>v.</i> Sayad Ali Rasool (I. L. R., 19 Bom., 273) ...	292
Ameena <i>v.</i> Kuttoo Khan (7 Sel. Rep., S. D. A., 32) ...	1, 16, 80
Ameena Bibee <i>v.</i> Zeifa Bibee (3 W. R., 37) ...	253
Ameenodeen <i>v.</i> M. Kubeeroodeen (4 Sel. Rep., S. D. A., 63) ...	296
Ameer Ammal <i>v.</i> Sankaranarayanan Chetty (I. L. R., 25 Mad., 658) ...	48
Ameeroonissa, In the matter of (11 W. R., 297) ...	218
Ameeroonissa <i>v.</i> Abedoonissa (I. R., 2 I. A., 87) ...	255
Ameer-oon-nissa <i>v.</i> Moorad-oon-nissa (6 M. I. A., 211) ...	44, 45
Amina Bibi <i>v.</i> Khatija Bibi (1 Bom., H. C. R., 157) ...	265, 266
Amir Dulhin <i>v.</i> Baij Nath Singh (I. L. R., 21 Cal., 311) ...	292
Amtul Nissa <i>v.</i> Mir Nurudin (I. L. R., 22 Bom., 489) ...	252
Anwari Begum <i>v.</i> Nizamuddin (I. L. R., 21 All., 165) ...	249
Asgur Ali <i>v.</i> Muhabbat Ali (22 W. R., 403) ...	5
Ashadoola <i>v.</i> Shaeba Jhasore (2 Hay, 345) ...	245, 289
Ashruf Ali <i>v.</i> Ashad Ali (16 W. R., 260) ...	127, 148, 198
Ashruffali <i>v.</i> Mirza Quasim (3 Sel. Rep., S. D-A., 65) ...	233
Ashruffunnissa <i>v.</i> Azeemun (1 W. R., 17) ...	245, 289
Ashrufodowlah <i>v.</i> Hyder Hossein (11 M. I. A., 94) ...	89, 196
Aulia Bibi <i>v.</i> Ala-ud-din (I. L. R., 28 All., 715) ...	272
Awais <i>v.</i> Har Sahai (I. L. R., 7 All., 716) ...	292
Azeeman <i>v.</i> Asghar Ali (2 Agra H. C. R., 167) ...	47
Azeemodin <i>v.</i> Fatima Beebee (1 Sel. Rep., S. D. A., 21) ...	255
Azeem-un-nissa Begum <i>v.</i> Clement Dale (6 Mad. H. C. R., 455) ...	264
Azizullah Khan <i>v.</i> Ahmed Ali Khan (I. L. R., 7 All., 353) ...	46
Azizunnissa Khatoon <i>v.</i> Karim-un-nissa Khatun (I. L. R., 23 Cal., 130) ...	18, 82, 198
Azmat Ali <i>v.</i> Mahmud-ul-nissa (I. L. R., 20 All., 96) ...	7
Azmat Ali Khan <i>v.</i> Lalli Begum (I. L. R., 8 Cal., 422; I. R., 9 I. A., 8) ...	197

B.

	PAGE.
Baba v. Shivappa (I. L. R., 20 Bom., 199) ...	235
Baboo Jan v. M. Noorool Huq (10 W. R., 375) ...	278
Badal Aurat v. Queen-Empress (I. L. R., 19 Cal., 79) ...	5, 30, 34
Badarannissa Bibi v. Mafiattala (7 B. L. R., 442) ...	127, 144, 148
Bai Hansa v. Abdulla (I. L. R., 30 Bom., 122) ...	122
Bakhshi Kishen Prasad v. Thakur Das (I. L. R., 19 All., 475) ...	16, 20, 75
Bakreedan v. Ummatul Fatma (3 Cal. L. J., 541) ...	44
Bakshan v. Madai Kooeri (3 B. L. R., 423) ...	233
Baland Khan v. Janee (3 N.-W. P., 319) ...	47
Banno Beebee v. Fukherodeen Hosein (2 Sel. Rep., S. D. A., 230) ...	42
Banoo Beebee v. Chand Beebee (2 Sel. Rep., S. D. A., 230)...	242
Bava Saib v. Mahomed (I. L. R., 19 Mad., 343) ...	244
Bazayet Hossein v. Dooli Chand (I. L. R., 4 Cal., 402, P. C.) ...	63
Bebee Bachun v. Sheikh Hamid Hossein (14 M. I. A., 377) ...	44
Bedar Bukht v. Khurruum Bukht (19 W. R., 315, P. C.) ...	43
Beebee Munwan v. Nusrut Ali (1 Sel. Rep., S. D. A., 86) ...	52
Beedhun Bibee v. Firzloollah (20 W. R., 411) ...	211, 212
Begoo Jann v. Gashee Bebee (6 W. R., 19) ...	44
Begum v. Doolee Chand (20 W. R., 92) ...	46
Bholanath v. Maqbul-un-nissa (I. L. R., 26 All., 28) ...	63
Bhoocha v. Elahi Bux (I. L. R., 11 Cal., 574) ...	215
Bhutnath Dey v. Ahmed Hosain (I. L. R., 11 Cal., 417) ...	234
Bibee Selamut v. Mowla Buksh (5 W. R., 194) ...	46
Bibee Tajim v. Syud Wahed Ali (22 W. R., 118)...	47
Budday Saib v. Zoono Bee (Dec. Mad. S. A., 199) ...	227
Buksh Ali v. Ameerun Bibee (2 W. R., 207) ...	139
Bunday Ali v. Chote Bebee (1 Agra H. C. R., 273) ...	47
Bunnoo v. Hedayut (6 Sel. Rep., S. D. A., 17) ...	247
Bussunteram v. Kamaluddin Ahmed (I. L. R., 11 Cal., 421) ...	292
Butoolun v. Koolsoom (25 W. R., 444) ...	7, 14, 82, 198
Buzloor Ruheem v. Shumsoonnissa Begum (11 M. I. A., 614) ...	2, 119
Buz-ul-Raheem v. Luteefutoon-nissa (8 M. I. A., 379), ...	125, 129, 136, 159

C.

Chaudhuri Mehdi Hasan v. Muhammad Hasan (10 C. W. N. 706, P. C.)	250
Chand Khan v. Beluk Khuna Bibi (Dec. S. D. A., 105) ...	243
Chekkone Kutti v. Ahmed (I. L. R., 10 Mad, 196) ...	249
Cherachom Vittil v. Vania Pudiakel (2 Mad. H. C. R., 350) ...	278

	PAGE.
<i>Chuki v. Shams-un-nissa</i> (I. L. R., 17 All., 19) ...	47
<i>Collector of Moradabad v. Harbans Singh</i> (I. L. R., 21 All., 17) ...	41

D.

<i>Decision, 1814</i> (2 Str., 271) ...	212
<i>Decision, 1814</i> (1 Mad. Dec. 118) ...	262
<i>Decision, 1820</i> (1 Mad. S. D. A., 254) ...	279
<i>Decision, 1832</i> (Sel. Rep., S. A. Bom., 103) ...	118
<i>Decision, 1846</i> (1 Dec. N. W., 112) ...	233
<i>Decision, 1849</i> (Morris' Sel. Dec., S. A., Bom., Pt. H., 29) ...	212
<i>Decision, 1850</i> (5 N. W. P., 39) ...	212
<i>Decision, 1853</i> (Morris' Sel. Rep., S. D. A., Bom., Pt. II., 41) ...	118
<i>Decision, 1855</i> (Dec., Mad., S. D. A., 157) ...	1, 3
<i>Decision, 1855</i> (Mad., S. D. A., 157) ...	178
<i>Dhan Bibi v. Lalon Bibi</i> (I. L. R., 27 Cal., 801) ...	198
<i>Dhun Sing v. Ram Sahai</i> (2 Agra H. C. R., 39) ...	47
<i>Din Muhammad, In the matter of</i> (I. L. R., 5 All. 226) 12, 91, 175,	182
<i>Doe dem Ramtonoo v. Bibee Jeemut</i> (1 Fulton, 152) ...	264
<i>Doulatram v. Abdul Kayum</i> (I. L. R., 26 Bom., 497) ...	283
<i>Dowlut Khatoon v. Khaja Alijan</i> (2 Agra H. C. R., 59) ...	323
<i>Durvash v. Shekun</i> (2 Borr., S. D. A., Bom., 24) ...	323

E.

<i>Ebrahimbhai v. Fulbai</i> (I. L. R., 26 Bom., 577) ...	256
<i>Eidan v. Mazhar Husain</i> (I. L. R., 1 All., 483) ...	43, 119
<i>Ekin Beebee v. Ashruf Ali</i> (1 W. R., 152) ...	251, 278, 289
<i>Emnabai v. Hajirabai</i> (I. L. R., 13 Bom., 352) ...	253
<i>Enaet Hossein v. Khoobunnissa</i> (11 W. R., 320) ...	266

F.

<i>Faiz Ahmed Khan v. Ghulam Ahmad Khan</i> (I. L. R., 3 All., 490 ; I. R., 3 I. A., 25) ...	251
<i>Faiz Muhammad Khan v. Muhammad Saeed Khan</i> (L. R., 25 I. A. 77 ; I. L. R., 25 Cal., 816) ...	272
<i>Fatima Bibee v. Ahmad Baksh</i> (I. L. R. 1 Cal., 319) ...	154, 247, 290
<i>Fatima Bibee v. Ariff Ismailjee Bham</i> (9 C. L. R., 66) ...	278
<i>Fatma Bibi v. Sadraddin</i> (2 Bom. H. C. R., 291) ...	43, 119
<i>Fazilatunnissa v. Kamarunnissa</i> (9 C. W. N., 352) ...	198
<i>Fukhrunnissa v. Ally Raza</i> (6 Sel. Rep., S. D. A., 368) ...	5, 34, 118

	PAGE.
Furzund Ali <i>v.</i> Jafur Bibee (1. L. R., 3 All., 266) ...	244
Furzund Hossein <i>v.</i> Janu Bibee (1. L. R., 4 Cal., 588) ...	130, 139
Fuseehun <i>v.</i> Kajo (1. L. R., 10 Cal., 15) ...	215
Futteh Ali <i>v.</i> Janwa (6 Sel. Rep., S. D. A., 216)... ..	244
Futteh Ali Shah <i>v.</i> Fuzeelutunissa (W. R., Sup. vol., 131)... ..	217
Fuzeelun Beebee <i>v.</i> Omdah Beebee (10 W. R., 469) ...	197
Fuzloonissa <i>v.</i> Nawabunnissa (2 Hay, 479) ...	89

G.

Gangbai <i>v.</i> Thavar Mulla (1 Bom. H. C. R., 71) ...	271, 278
Gholam Husun Ali <i>v.</i> Zeinub Beebee (1 Sel. Rep., S. D. A., 63) ...	20, 63
Ghufoorun Bebee <i>v.</i> Khwajeh Mustukedeh (2 Agra H. C. R., 300) ...	47
Ghulam Ali <i>v.</i> Sagir-ul-nissa (1. L. R., 23 All., 432) .	63
Ghulam Mustafa <i>v.</i> Hurmat (1. L. R., 2 All., 854) ...	246
Gouhur Ali Khan <i>v.</i> Ahmed Khan (20 W. R., 214, P. C.) ..	127
Gulam Hussain <i>v.</i> Aji Ajam (4 Mad. H. C. R., 44) ..	244
Gulam Jafar <i>v.</i> Masludin (1. L. R., 5 Bom., 238) ...	244
Gulam Mustapha <i>v.</i> Hurmut (1. L. R., 2 All., 854) ...	289
Gyaz-ood-deen <i>v.</i> Fatima (1 Agra, H. C. R., 238) ...	260

H.

Hadi Ali <i>v.</i> Akbar Ali (1. L. R., 20 All., 262) ...	46, 63
Hafeez-oor-Rahman <i>v.</i> Khadim Hossein (4 N. W. P., H. C. R., 106) ...	299
Haji Ismail, In the matter of (1. L. R., 6 Bom., 452) ...	301
Hamid Ali <i>v.</i> Imtiazan (1. L. R., 2 All., 71) ...	130, 210
Hamidoollah <i>v.</i> Faizunnissa (1. L. R., 8 Cal., 327) ...	127, 148
Hamidunnissa <i>v.</i> Zohiruddin Sheik (1. L. R., 17 Cal., 670) ...	6, 121
Hamir Singh <i>v.</i> Zakia (1. L. R., 1 All., 57, F. B.)... ..	234, 292
Hasan Ali <i>v.</i> Mahrban (1. L. R., 2 All., 625) ...	323
Hasanali <i>v.</i> Mehdi Hussain (1. L. R. 1 All., 535) ...	234
Hassarat Bibi <i>v.</i> Golan Jaffar (3 C. W. N., 57) ...	246, 289, 290
Helen Skinner <i>v.</i> Sophia Evelina Orde (10 B. L. R., 125, P. C.) ...	77, 212
Henry Imlach <i>v.</i> Zuhooroonisa Khanum (4 Sel. Rep., 5 D. A., 382) ...	296
H. H. Azim-un-nissa Begum <i>v.</i> Clement Dale (6 Mad. H. C. R., 455) ...	264
Hidayat Ali <i>v.</i> Tajan (5 Sel. Rep., S. D. A., 335) ...	279
Himmat Bahadur <i>v.</i> Sahebzadee Begum (14 W. R., 125) ...	16, 20, 75
Hossein Ali, In the matter of (1 Fulton, 359) ...	293
Hosseini Begum, In the matter of (1. L. R., 7 Cal., 434) ...	218
Hosseinoodeen Chowdree <i>v.</i> Tajunnissa Khatoon (W. R. Sup. Vol. 199) ...	44

	PAGE.
Hub Ali <i>v.</i> Wazir-un-nissa (I. L. R., 28 All., 496) ...	6
Hukeem Wahid Ali <i>v.</i> Khan Beebee (3 Sel. Rep., S. D. A., 136) ...	7
Humeada <i>v.</i> Budhun (17 W. R., 527, P. C.) ...	47
Humera Bibi <i>v.</i> Najm-un-Nissa (I. L. R., 28 All., 147) ...	261
Hurbai <i>v.</i> Hiraji (I. L. R., 20 Bom., 116) ...	235
Hurron <i>v.</i> Khyroollah (I. Fulton, 361) ...	15
Huseena <i>v.</i> Husmutoonissa (7 W. R., 495) ...	51
Husein Begam <i>v.</i> Zia-ul-nisa (I. L. R., 6 Bom., 467) ...	234
Hussain <i>v.</i> Mira (I. L. R., 13 Mad., 46) ...	260
Hussain Khan Bahadur <i>v.</i> Nateri Srinivasa (6 Mad. H. C. R., 356) ...	261

I.

Ibrahim <i>v.</i> Syed Bibi (I. L. R., 12 Mad., 63) ...	129, 135, 141
Ibrahim Ali Khan <i>v.</i> Ummat-ul-Zohra (I. L. R., 19 All., 267, P. C. ; L. R., 24 I. A., 1) ...	260
Ibrahim Mulla <i>v.</i> Enayetur Ruhman (4 B. L. R., 13) ...	125
Idu <i>v.</i> Amiran (I. L. R., 8 All., 322) ...	218
Imam Bukhsh, In the matter of (I. L. R., 9 Cal., 599) ...	215
Imdad Ali <i>v.</i> Kadir Baksh (5 Sel. Rep., S. D. A., 345) ...	253
Ismal <i>v.</i> Ramji (I. L. R., 23 Bom., 682) ...	249
Ismal Khan <i>v.</i> Fidayat-un-nissa (I. L. R., 3 All., 723) ...	197

J.

Jafier Khan <i>v.</i> Hubshee Bibee (1 Sel. Rep., S. D. A., 16) ...	257
Jafri Begam <i>v.</i> Amir Muhammad (I. L. R., 7 All., 822, F. B.) ...	292
Janee Khanum <i>v.</i> Amatool Fatima (2 B. L. R., A. C., 306 ; 8 W. R., 53 ...	45, 63
Jaun Beebee <i>v.</i> Beparee (3 W. R., 93) ...	130
Jeetoo <i>v.</i> Buddun (6 Sel. Rep., S. D. A., 231) ...	244
Jehan Khan <i>v.</i> C. K. Mandy (10 W. R., 185) ...	296
Jeswunt Sing <i>v.</i> Jet Sing (3 M. I. A., 245) ...	198, 242
Jiwan Bakhsh <i>v.</i> Imtiaz Begam (I. L. R., 2 All., 93) ...	253
Joshy Assam, In the matter of (I. L. R., 23 Cal., 290) ...	219
Jumeela <i>v.</i> Mulleeka (W. R., Sup. Vol., 252) ...	119
Jumeenooddeen Ahmed <i>v.</i> M. Hossein Ali (2 W. R., 49) ...	275

K.

Kadirdad Khan <i>v.</i> Nooroon Nissa (7 Sel. Rep., S. D. A., 185) ...	42
Kalee Khan <i>v.</i> Jadee (5 N. W. P. H. C. R., 62) ...	323

	PAGE.
Kali Dutt Jha v. S. Abdool Ali (I. L. R., 16 Cal., 627 ; 16 I. A., 96)	234, 314
Kaloo v. Guribullah (13 B. L. R., 163)	23
Kamar-un-nissa Bibi v. Hussaini Bibi (I. L. R., 3 All., 266)	9, 255
Kareem Buksh v. Doolhin Khoord (15 W. R., 82) ...	46
Karimullah v. Amani Begum (I. L. R., 17 All., 93) ..	46
Kasam Pirbhai, In the matter of (8 Bom. H. C. R., Cr., 95)	130, 141
Kasim Ali v. Muhammad Hosen (5 Sel. Rep., S. D. A., 253)	253
Kasim Husain v. Sharif-un-nissa (I. L. R., 5 All., 285) ...	253
Kasum v. Shaista Bibi (7 N. W. P. H. C. R., 313) ...	248
Kedarnath Chuckerbutty v. Benjamin Donzelle (20 W. R., 352)	89
Keramatul v. Nissan Bibee (2 Morley, 120)	277
Khadeja Beebee v. Suffer Ali (4 W. R., 36)	271
Khader Hussain Sahib v. Hussain Begum Sahiba (5 Mad. H. C. R., 114)	255
Khairat Ali v. Zahuran (5 Sel. Rep., S. D. A., 19) ...	196
Khaja Hidayat Oollah v. Rai Jan Khanum (3 M. I. A., 295)	89
Khajarannissa v. Risannissa Begum (13 W. R., 371; 5 B. L. R., 84) ..	44
Khajooroonissa v. Rowshan Jehan (I. L. R., 2 Cal., 184) ...	28
Khajooroonissa v. Rayeesoonissa (I. L. R., 2 I. A., 235) ...	119
Khajoorunnissa v. Roheemannissa (17 W. R., 190) ...	272
Khanum Jan v. Jan Bebee (4 Sel. Rep., S. D. A., 266) ...	257
Khatija Bibi, In the matter of (5 B. L. R., 557)... ..	33, 218
Khujooroonissa v. Roushan Jehan (I. L. R., 3 I. A., 291) ...	253, 272
Khyratun v. Amanee (11 W. R., 212)	47
Kishwar Khan v. Jewun Khan (1 Sel. Rep., S. D. A., 33) ...	255
Kolashun Bibee v. Sheikh Didar Buksh (24 W. R., Cr., 44)	95
Korban v. King-Emperor (I. L. R., 32 Cal., 444)	34, 219
Kulsoon v. Ameerunnissa (1 Hyde, 150)	268
Kummur-ool-nissa v. Mohamed Hussun (1 Agra H. C. R., 287)	47
Kunhi v. Moidin (I. L. R., 11 Mad., 327)	6, 121
Kurban v. King-Emperor (I. L. R., 32 Cal., 444)... ..	34, 219
Kureemuhnissa v. Mohabut Khan (Dec. S. D. A., 356) ...	7
Kureemoonissa v. Ruheem Ali (2 Sel. Rep., S. D. A., 299) ...	57
Kureem-oon-nissa v. Ata-ool-lah (2 Agra H. C. R., 217) ...	14
Kureemun v. Mullick Enaet Hossein (W. R., Sup. Vol., 221)	245, 289
Kuvarbai v. Mir Alam Khan (I. L. R., 7 Bom., 170) ...	244

L.

Labbi Beebee v. Bibbun Beebee (6 N. W. P. H. C. R., 158)	245, 290
Land Mortgage Bank v. Bidayadhari Dasi (7 C. L. R., 460)	292

	PAGE.
Land Mortgage Bank <i>v.</i> Roy Luchmiput Singh (8 C. L. R., 447) ...	292
Lardli Begum <i>v.</i> Mahomed Amir Khan (I. L. R., 14 Cal., 615) ...	218
Liaqat Ali <i>v.</i> Karimunissa (I. L. R., 15 All., 396)... ..	198
Luddun Sahiba, In the matter of (I. L. R., 8 Cal., 736) ...	10, 12, 91, 98
Luteefoonisa <i>v.</i> Syed Rajaoor Rahman (8 W. R., 84) ..	243

M.

M. Abdul Wahab <i>v.</i> Hingu (5 Sel. Rep., S. D. A., 238)	159
Mafulzzul Hossain <i>v.</i> Basid Shaikh (4 Cal. L. J., 485)	235
Mahabu Bibi <i>v.</i> Amnia (10 Bom. H. C. R., 430)	44
Mahar Ali <i>v.</i> Amani (2 B. L. R., A. C., 306)	45
Mahin Bibi, In the matter of (13 B. L. R., 160)	21, 23, 34, 218
Mahomed Abed Ali Kumar Kadar <i>v.</i> Ludden Sahiba (I. L. R., 14 Cal., 276)	10, 125
Mahomed Altaf Ali <i>v.</i> Ahmed Buksh (25 W. R., 121)	275
Mahomed Ameenoodin Khan <i>v.</i> Moozuffar Hossein (5 B. L. R. 570 ; 14 W. R., 5, P. C.)	46
Mahomed Banker Hossain <i>v.</i> Shurfoon-nissa Begum (8 M. I. A., 136) ..	89
Mahomed Buksh Khan <i>v.</i> Hosseini Bibi (I. R., 15 I. A., 81 ; I. L. R., 13 Cal., 684)	253
Mahomed Mudun <i>v.</i> Khodezunnissa (2 W. R., 181)	276
Mahomed Museehooddin <i>v.</i> Clara Jane Museehooddin (2 N.-W. P. H. C. R., 173)	101, 111
Mahomed Reza <i>v.</i> Inait Rezza (S. D. A., Dec. Ben., 18)	198
Mahtala Bibee <i>v.</i> Ahmed Haleemoozooman (10 C. L. R., 293) ..	7, 198
Majidah <i>v.</i> Muhammad Ali (5 Sel. Rep., S. D. A., 162)	252
Majidan <i>v.</i> Ram Narain (I. L. R., 26 All., 22)	235
M. Ameenooden <i>v.</i> M. Kubeeroodeen (4 Sel. Rep., S. D. A., 63) ...	296
Mandoo Bibee <i>v.</i> Jahandar Khan (1 Agra H. C. R., 350)	244
Mani Bibi <i>v.</i> Sahebzadi (5 Sel. Rep., S. D. A., 129)	323
Manowar Khan <i>v.</i> Abdullah Khan (3 N. W. P. H. C. R., 177) ..	14, 20
Masit-un-nissa <i>v.</i> Pathani (I. L. R., 26 All., 295)	14, 198
Masthan Saheb <i>v.</i> Assan Bivi Ammal (I. L. R., 23 Mad., 371) ..	43
M. Awais <i>v.</i> Har Sahai (I. L. R., 7 All., 716)	292
Mayhew <i>v.</i> Mayhew (I. L. R., 19 Bom., 293)	130
Mazhar Ali <i>v.</i> Budh Singh (I. L. R., 7 All., 297, F. B.,)	323-326
Mazhar Husen <i>v.</i> Bodha Bibi (I. L. R., 21 All., 91, P. C.; L. R., 25 I. A., 219)	272

M. Azmat Ali Khan <i>v.</i> Lalli Begum (I. L. R., 8 Cal., 422; L. R., 9 I. A., 8)	197
Meeran <i>v.</i> Najeebun (2 Agra H. C. R., 335)	47
Meer Ashruff Ally <i>v.</i> Nusebun Bibee (2 Hay, 163)	251
Meer Nujeebullah <i>v.</i> Kuseema (1 Sel. Rep., S. D. A., 13)	247
Meer Ubdoool Kareem <i>v.</i> Fuhkroonissa (3 S. D. A., 60)	225, 252
Meherali <i>v.</i> Tajudin (I. L. R., 10 Bom., 156)	244
Mehran <i>v.</i> Kubiran (6 B. L. R., 60)	45, 47
Mereamoonissa Begam <i>v.</i> Imdadee Begum (3 S. D. A., N.-W. P., 185)	43
M. Faiz Ahmed Khan <i>v.</i> Ghulam Ahmad Khan (I. L. R., 3 All., 490; L. R., 3 I. A., 25)	251
Mihr Ali <i>v.</i> Kureemmoonisa Begum (2 Sel. Rep., S. D. A., 142)	89
Mirza Beebee <i>v.</i> Toola Beebee (4 Sel. Rep., S. D. A., 425)	267
M. Ismal Khan <i>v.</i> Fidayat-un-nissa (I. L. R., 3 All., 723)	197
M. Mumtaz Ahmed <i>v.</i> Zubaida Jan (I. L. R., 11 All., 460, P. C.	254
Mogul Begum <i>v.</i> Fukeerun Beebee (3 N.-W. P. H. C. R., 288)	272
Mogulsha <i>v.</i> Mahamed (I. L. R., 11 Bom., 517)	244
Mohamed Ussud-oollah <i>v.</i> Ghasheea Bibee (1 Agra H. C. R., 167)	47
Mohammad Alif <i>v.</i> Chandaree Petro (5 Sev., S. D. A., 119)...	293
Mohamuddy Begum <i>v.</i> Omdutoonnissa (13 W. R., 454)	211
Mohinuddin <i>v.</i> Manehershah (I. L. R., 6 Bom., 650)	243
Mohumdee Begum <i>v.</i> Bairam Khan (1 Agra H. C. R., 130)...	36
Mokoond Lal Singha <i>v.</i> Nobodip Chunder Singha (I. L. R., 25 Cal., 881)	219
Molk Enaet Hossein <i>v.</i> Kureemmoonissa (3 W. R., 40)	245
Moneerooddeen <i>v.</i> Ramdhun Bajeekur (18 W. R., Cr., 28)	6
Monowar Khan <i>v.</i> Abdoollah Khan (3 N.-W. P. H. C. R., 177)	20, 75
Moolla Cassim <i>v.</i> Molla Abdul Rahim (I. L. R., 33 Cal., 173, P. C.; 10 Cal. W. N., 33)	326
Moohummud Umeer Khan <i>v.</i> Jumadar Bucha Bhaee (2 Borr. 665 Bom., S. A.,)	242
Moyna Bibi <i>v.</i> Banku Behary Biswas (I. L. R., 29 Cal., 473; 6 C. W. N., 667)	235
Mozuffur Ali <i>v.</i> Kumurunnissa (W. R., Sup. Vol., 32)	138
Muchoo <i>v.</i> Arjoon Sahoo (5 W. R., 235)...	219
Muhammed Noor Buksh <i>v.</i> Budun Chand Bibee (Dec. S. D. A., 885)	42
Muhammad Abdul Majid <i>v.</i> Fatima Bibi (I. L. R., 8 All., 39, P. C.; L. R., 12 I. A., 159)	274
Muhammad Allahabad <i>v.</i> Muhammad Ismail (I. L. R., 8 All., 234)	197

	PAGE.
Muhammad Esuph <i>v.</i> Pattamsa (I. L. R., 23 Mad., 70) ...	264
Muhammad Gulshere Khan <i>v.</i> Mariam Begam (I. L. R., 3 All., 731)	246, 290
Muhammad Ibrahim <i>v.</i> Gulam Ahmed (1 Bom. H. C. R., 236)	22, 30
Muhammadunissa Begam <i>v.</i> Bachalor (I. L. R., 29 Bom., 428)	261
Mulkah Do Alum <i>v.</i> Jehan Kudr (10 M. I. A., 252) ...	47
Mulka Jehan <i>v.</i> Mahomed Uskhurree (L. R., I. A., Sup. Vol., 192)	28, 29
Mulleeka <i>v.</i> Jumeela (11 B. L. R., 375, P. C.) ...	40, 44
Mullick Abdool Guffoor <i>v.</i> Muleka (I. L. R., 10 Cal., 1112)	249
Mumtaz Ahmed <i>v.</i> Zubaida Jan (I. L. R., 11 All., 460, P. C.)	254
Mumtaz-un-nissa <i>v.</i> Tofail Ahmed (I. L. R., 28 All., 264) ...	249
Musnad Ali <i>v.</i> Khurseed Banoo (Sel. Rep., S. D. A., 69) ...	244
Mymonnissa <i>v.</i> Mohabuth Ally (2 Hay, 404) ...	144, 148
M. Zubeerul Huq <i>v.</i> Butoolun (1 W. R., 79) ...	243

N.

Nabokant Roy <i>v.</i> Mahatala Bibee (20 W. R., 164) ...	198
Nasir Hussain <i>v.</i> Sughra Begam (I. L. R., 5 All., 505) ...	252
Nasoo <i>v.</i> Mahatal Beebee (4 W. R., 7) ...	46
Nasrat Hussain <i>v.</i> Hamidan (I. L. R., 4 All., 205) ...	119
Nawab Akbari Begum <i>v.</i> Nuzhat-ud-dowla (1 Cal. L. J., 594 ; 9 C. W. N., 938, P. C.) ...	277
Nawab Amin-ood-dowla <i>v.</i> Syud Roshun Ali Khan (5 M. I. A., 199) ...	277
Nawab Syud Asadoolla Khan <i>v.</i> Sumerchand Dutta (Dec. S. D. A., Ben., 595) ...	315
Neermullee Bibee <i>v.</i> Assudonisa Bibee (6 Sel. Rep., S. D. A., 359) ...	247
Nepoor Aurut <i>v.</i> Jurai (10 B. L. R., App., 33) ...	102, 141
Newazee Feraush <i>v.</i> Atlussee (1 Sel. Rep., S. D. A., 41) ...	259
Nezam-ud-din <i>v.</i> Zaheda Bibi (6 N.-W. P. H. C. R., 338) ...	255
Nizam-uddin <i>v.</i> Anandi Prasad (I. L. R., 18 All., 373) ...	235
Noor Buksh Chowdree <i>v.</i> Mahomed Arif Chowdree (7 Sel. Rep., S. D. A., 142) ...	42
Noor Kadar Khan <i>v.</i> Hurdial (1 Agra H. C. R., 67) ...	244
Noorunnissa Begum <i>v.</i> Nawab Syed Moshin Ali Khan (7 Sel. Rep., S. D. A., 46) ...	43, 130
Nowsha Begum <i>v.</i> Umrao Begum (7 N.-W. P. H. C. R., 60) ...	9
Nujeeb-oonissa <i>v.</i> Zumeerun (11 W. R., 426) ...	197
Nujmoodeen <i>v.</i> Zuhooran (10 W. R., 45) ...	198
Nur Kadir <i>v.</i> Zulaikha Bibi (I. L. R., 11 Cal., 469) ...	34, 218

	PAGE.
Nuruddin v. Chenuri (3 Cal. L. J., 49)...	127, 148
Nuseehoonissa v. Syed Danush Ali (3 W. R., 133)	47
Nusrut Ali v. Zeinunnissa (15 W. R., 146)	276

O.

Obedur Reza v. Mahomed Muneer (16 W. R., 88)	248
Oojudhea Beebee v. Mohun Bebee (6 Sel. Rep., S. D. A., 34)	42, 242
Oomda Beebee v. Syud Shah Jonab (5 W. R., 132)	197
Oomduton-nissa Begum v. Asud Ali (1 Sel. Rep., S. D. A., 369).	40
Oomattoonnissa v. Areefoonnissa (4 W. R., 66)	275

P.

Parmeshar Rai v. Bishesar Singh (I. L. R., 1 All., 53)	323
Pathummbi v. Vittil Ummachari (I. L. R., 26 Mad., 734)	235
Pirthe Pal Singh v. Hussaini Jan (I. L. R., 4 All., 361)	292
Prince Suleman Kadr v. Darab Ali Khan (L. R., 8 I. A., 117)	272

Q.

Qadir Ali Khan v. Nowsha Begum (2 N.-W. P. H. C. R., 154)	276
Qaim Ali v. Hingun (3 Sel. Rep., S. D. A., 203)	89
Queen v. Khyroollah (6 W. R., Cr., 21, F. B.)	7, 88

R.

Rahim Bakhsh v. Muhammad Hasan (I. L. R., 11 All., 1)	268
Rahut-oo-nissa v. The heirs of Mirza Hizubr Beg (2 Sel. Rep., S. D. A., 254)	41
Raj Begum v. Reza Hossein (2 W. R., 76)	217
Ram Baksh v. Mughlani Khanan (I. L. R., 26 All., 266)	63
Ram Kumari, In the matter of (I. L. R., 18 Cal., 264)	20, 75
Ranee Khajooroonissa v. Mirza Saifoolla Khan (15 B. L. R., 306, P. C.)	44
Rezza Hossein v. Ifatoonnissa (2 Hay, 564)	52
Robert Skinner v. Charlotte Skinner (I. L. R., 25 Cal., 537, P. C.)	77
Rook Begum v. Walagowhur Shah (3 W. R., 187)	196
Roshan Jahan v. Syed Enaet Hossein (5 W. R., 4)	196, 243
Rujabai v. Ismail Ahmed (7 Bom. H. C. R., 27)	260
Ruzia Begum v. Aka Mahomed Ibrahim (1 Sel. Rep., S. D. A., 199)	283

S.

Sadakat Hossein v. Mahomed Yusuf (I. L. R., 10 All., 663; L. R., 11 I. A., 31)	197
--	-----

	PAGE.
Sabeebun v. Khodabuxsh (6 Sel. Rep., S. D. A., 51) ...	251
Sahiba Begum v. Atchamma (4 Mad. H. C. R., 115) ...	251
Sahiba Begum v. Atchamma (4 Mad. H. C. R., 115) ...	46
Sahibjan Khatoon v. Dianut Beebee (3 Sel. Rep., S. D. A., 16) ...	45, 61
Sahib-un-nissa Bibi v. Hafza Bibi (I. L. R., 9 All., 213) ...	256
Saithri, In the matter of (I. L. R., 16 Bom., 307) ...	219
Sajjad Ahmad v. Kadri Begam (I. L. R., 18 All., 1) ...	257
Sakina Khanum v. Laddan Saheba (2 Cal. L. J., 218) ...	130
Sarabai v. Rabiabai (I. L. R., 30 Bom., 537) 129, 141, 151-154, 155-156	
Sayad Umed Ali v. Saffihan (3 B. L. R., 175) ...	47
Sayad Valimia v. Gulam Kadr (6 Bom. H. C. R., 25) ...	251
S. Hafeez-oor-Rahman v. Khadim Hossein (4 N.-W. P. H. C. R., 106) ...	299
Shah Abu Ilyas v. Ulfat Bibi (I. I. R., 19 All., 50) ...	102, 182
Shahebzadi Begum v. Himmudt Bahadur (4 B. L. R., A. C., 103 ; 13 B. L. R., 182, P. C.) ...	200
Shah Enaet Hossein v. Syud Ramzan (10 W. R., 216) ...	301
Shahjan Bibee v. Shib Chunder Shaha (22 W. R., 314) ...	248
Shah Makdum Bakshsh v. Lutf Ali (5 Sel. Rep., S. D. A., 416) ...	268
Shah Najumooddeen Ahmed v. Beebee Hosseinee (4 W. R., 110) ...	41, 49
Shaik Futteh Ali v. Jarwa (6 Sel. Rep., S. D. A., 216) ...	42
Shaikh Nasoo v. Mahatab Beebee (4 W. R., 7) ...	61
Shaik Ibhran v. Shaik Suleman (I. L. R., 9 Bom., 146) ...	249
Sharifa Bibi v. Gulam Mahomed (I. L. R., 16 Mad., 43) ...	246, 289
Sheikh Uzeez-oolla v. Ghufoor Beebee (2 Borr. Bom. S. D. A., 284) ...	47
Shekh Humeed-oo-deen v. Nuzur-ood-deen (2 Bom. Borr., S. D. A., 704) ...	244
Shek Muhammad v. Shek Imanuddin (2 Bom. H. C. R., 50) ...	275
Sherif Saib v. Usanabibi (6 Mad. H. C. R., 452) ...	129
Shumshool-nissa v. Zohra (6 N. W. P., H. C. R., 2) ...	243
Shumsoonisa v. Gouhur Ali (4 Sel. Rep., S. D. A., 359) ...	15, 20, 43, 82
Shumsoonissa v. Noor Beebee (S. D. A., N.-W. P. 33) ...	43
Shureefoonissa v. Khizuroonissa (3 Sel. Rep., S. D. A., 280) ...	18, 81
Sidheswar Teor v. Gyanada Dasi (I. L. R., 22 Cal., 291) ...	102
Sitaram v. Amir Begam (I. L. R., 8 All., 324) ...	232, 235
S. Jumeenooddeen Ahmed v. M. Hossein Ali (2 W. R., 49) ...	275
Skinner v. Skinner (I. L. R., 25 Cal., 537, P. C.) ...	18
S. Kasum v. Shaista Bibi (7 N.-W. P. H. C. R., 313) ...	244
Sobratl v. Jungli (2 C. W. N., 245) ...	5, 34

	PAGE.
Solah Bibee <i>v.</i> Keerun Bibee (16 W. R., 175) ...	268
Soobhaneer <i>v.</i> Bhetun (1 Sel. Rep., S. D. A., 464) ...	277
Soorma Khatoon <i>v.</i> Attaffoonnissa Khatoon (2 Hay, 210) ...	44
Suffuroonnissa <i>v.</i> Ayesha Bibi (6 Sel. Rep., S. D. A., 215) ...	42, 242
Sugra Bibi <i>v.</i> Masuma Bibi (I. L. R., 2 All., 573) ...	48
Sukoomut Bibee <i>v.</i> S. Warris Ali (22 W. R., 400) ...	278
Suleman Kadr <i>v.</i> Darab Ali Khan (I. L. R., 8 Cal., 1, P. C.; L. R., 8 I. A., 117) ...	244, 272
Suleman Kadr <i>v.</i> Mehdi Begum Surreya (L. R., 20 I. A., 144; I. L. R., 21 Cal., 135, P. C.) ...	41
Syedan <i>v.</i> Syed Vilayet Ali Khan (17 W. R., 239) ...	233, 314
Syed Atahur Ali <i>v.</i> Altaf Fatima (10 W. R., 370) ...	44
Syed Bazuyat Hossein <i>v.</i> Dooli Chand (L. R., 5 I. A., 211; I. L. R., 4 Cal., 402, P. C.) ...	292
Syed Jummeeddeen Mahomed <i>v.</i> Muheooddeen Bebee (S. D. A., Ben., 932) ...	83
Syed Lutf Ali <i>v.</i> Syed Rahut Ali (6 Sel. Rep., S. D. A., 190) ...	276
Syed Mozuffur Ali <i>v.</i> Kumurunnissa Bibee (W. R., Sep. Vol., 32) ...	134, 135, 138
Synd Hussain Ali <i>v.</i> Fiyazuddin (5 Sel. Rep., S. D. A., 283) ...	267
Synd Shah Basit Ali <i>v.</i> Synd Shah Imamooddin (3 Sel. Rep., S. D. A., 234) ...	242

T.

Tadiya <i>v.</i> Hasenebiyari (6 Mad. H. C. R., 9) ...	44, 119
Tajoo Beebee <i>v.</i> Noorun Bebee (1 W. R., 31) ...	41
Tameez Begum <i>v.</i> Furhut Hossein (3 N.-W. P. H. C. R., 55) ...	272
Taufikunnissa <i>v.</i> Ghulam Kambar (I. L. R., 1 All., 506) ...	43, 49
Tayheb Ally, In the matter of (2 Hyde, 63) ..	217

U.

Umjad Ally Khan <i>v.</i> Mohumdee Begum (11 M. I. A., 517; 10 W. R., 25, P. C.) ...	247
Umrao Bibi <i>v.</i> Jan Ali Shah (I. L. R., 20 All., 465) ...	260
Ushruf-un-nissa <i>v.</i> Nujeeba Banoo (7 Sel. Rep., S. D. A., 65) ...	240
Ussud Ali Khan <i>v.</i> Olfut Beebee (3 Agra H. C. R., 237) ...	243
Uzeez-oo-nissa <i>v.</i> Culub Ali (3 Sel. Rep., S. D. A., 428) ...	51

V.

	PAGE.
Vadake Vitil Ismal <i>v.</i> Beyakutti Umah (I. L. R., 3 Mad., 347)	... 159
Valayet Hossein <i>v.</i> Maniram (5 C. L. R., 91)	... 248

W.

Wahidunnissa <i>v.</i> Shubrattun (6 B. L. R., 54 ; 14 W. R., 239)	45, 63
Waj Bibee <i>v.</i> Azmut Ali (8 W. R., 23)	... 127
Wajeed Ali <i>v.</i> Abdool Ali (W. R., Sup Vol., 121)	... 260
Waliullah <i>v.</i> Miran Sahib (2 Bom. H. C. R., 285)	... 198
Wazir Ali <i>v.</i> Kaim Ali (5 N.-W. P. H. C. R., 196)	... 34, 213
Wazir Jan <i>v.</i> Altaf Ali (I. L. R., 9 All., 357)	... 246, 289
Wilayat Hussain <i>v.</i> Allah Rakhi (I. L. R., 2 All., 831)	... 119
Wise <i>v.</i> Sundaloonissa (7 W. R., 13, P. C.)	... 197
Woomatool Fatima <i>v.</i> Meerunmunnessa (9 W. R., 318)	... 45
Wuheedun <i>v.</i> Wusee Hossein (15 W. R., 403)	... 197
Wuzeerun <i>v.</i> Mahomed Hossain (5 Sel. Rep., S. D. A., 40)	... 47
Wuzeerun Beebee <i>v.</i> Hossan Khan (S. D. A., Ben., 841)	... 63
Wujih-oon-nissa Khanum <i>v.</i> Husun Ali (1 Sel. Rep., S. D. A., 356)	... 48

Y.

Yasin Khan <i>v.</i> Yar Khan (I. L. R., 19 All., 504)	... 63
Yusuf Ali <i>v.</i> Collector of Tippera (I. L. R., 9 Cal., 138)	... 248

Z.

Zakeri Begum <i>v.</i> Sakina Begum (L. R., 19 I. A., 157 ; I. L. R., 19 Cal., 689, P. C.)	... 41, 48
Zohorooddeen <i>v.</i> Baharoolia (W. R., Sup. Vol., 185)	... 251
Zuheerul Huq <i>v.</i> Butoolun (1 W. R., 79)	... 243

BIBLIOGRAPHY OF WORKS IN THE ORIGINAL ARABIC.

Aieni (Bombay)—

A commentary on Kunz ul-Dukaik by Mahmood bin Ahmed, 855, A. H.

Bahrr-ul-Rayek (Egypt, 1311, A. H.)—

"The Bahrr-ar-Rayik is by Zain-al-Aabidin Ben Nujaim-al-Misri, who died in A. H. 970 (A. D. 1562). He left his work incomplete at his death, but it was finished by his brother, Siraj-ad-Din Umr, who also wrote another and inferior commentary on the same work, entitled the Nahr-al-Faik."—Introduction to Morley's Digest of Indian Cases, Vol I, p. cclxx.

See also *Kashf-uz-Zunun*, Vol. V, p. 250 (Leipzig.)

Durrul-Mukhtar (Lucknow, 1314, A. H.)—

"A note book, or Hashiyat, entitled the Hashiyat-al-Tahtawi Ala Durrul-Mukhtar, was printed and published at Bulak, in the year 1839 (A. H. 1254); but I have not seen it, and am not aware whether it be explanatory of the work of Al-Hiskafi, or of some other treatise bearing a similar title."—Introduction to Morley's Digest of Indian Cases, Vol. I, pp. cclxxxviii—cclxxxix.

Fatawa-i-Alamgiri (Lucknow, 1312, A. H.)—

"The Fatawa-i-Alamgiri was commenced in the year of the Hijrah 1067 (A. D. 1656), by order of the Emperor Aurangzeb Aalamgir, by whose name the collection is now designated. It contains a bare recital of law cases, without any arguments or proofs; an omission which renders it defective for elementary instruction. The immense number of cases, however, compensate in some measure for this want, which is, moreover, supplied by the Hedayah, and other works; and the insertion of argument can the more readily be dispensed with, since the opinions of the modern compilers could not have been esteemed of equal authority with those of the older writers on jurisprudence, and the mere decisions, without comment or explanation, are equally applicable to particular

cases, when illustrated and explained by reference to works of authority as text books."—Introduction to Morley's Digest of Indian Cases, Vol. I, p. cclxxxix.

"Of the books of Futawa which have been mentioned, none appear to require further notice, except the Fatawa-i-Alamgiri. Mr. Hamilton, by an extraordinary mistake, has stated this work to have been composed in the Persian language, by the authority and under the inspection of the 'Emperor Aurangzeb;' whereas it is well-known to have been written in Arabic, the usual language of Mahammudan law and science; and to have been translated into Persian, by order of the Emperor's daughter, the Princess Zeb-oo-Nisa. Several copies of the Arabic original are in Calcutta; and some imperfect copies of the Persian version; or rather of parts of it. In the catalogue of books appertaining to the Nizamat Adalut (among which is an incomplete copy of the Arabic Fatawa-i-alumgeeree), the Kazee-ool-Koozat describes this work in the following terms:—'It was commenced in A. H. 1067,' corresponding with the 11th year of Alamgir's reign."—Harington's Analysis of the Bengal Regulations, Vol. I, p. 243.

Fatawa-i-Kazi Khan (Lucknow, 1295, A. H.)—

"The Fatawa-i-Kazi Khan, or collection of decisions of the Imam Fakhr-ad-Din Hasan Ben Mansur al-Uzjandi al-Farghani, commonly called Kazi Khan, who died in A. H. 592 (A. D. 1195), is a work held in the highest estimation in India, and indeed, is received in the Courts as of equal authority with the Hidayah of Burhan-ad-Din Ali, with whom Kazi Khan was a contemporary: it is replete with cases of common occurrence, and is therefore of great practical utility, the more especially as many of the decisions are illustrated by the proofs and reasoning on which they are founded."—Introduction to Morley's Digest of Indian Cases, Vol. I, p. cclxxxv.

"The Futawa-i-Kazi Khan by Fakhr-ood-Deen Husun, of Ouzjand, in Furghana, who was contemporary with the author of the Hidayah, and whose collection is esteemed of equal authority with that celebrated work, must, in some measure, be excepted from the above remark, as it illustrates many cases by the proofs and reasoning upon which the decision of them is founded."—Harington's Analysis of the Bengal Regulations, Vol. I, p. 236.

See also *Kashf-uz-Zunun*, Vol. IV, p. 364 (Leipzig).

Fatawa-i-Khairiah (Egypt, 1300 A. H.)—

A collection of *Fatwas* by Khairuddin Ahmed-al-Faruqi, 1081, A. H.

Fatawa-i-Serajiah (Lucknow, 1295, A. H.)—

"The highest authority on the law of inheritance amongst the Sunnis of India is the Sirajiyah, which is sometimes called the Faraiz-as-Sajawandi, and was composed by Siraj-ad-Din Muhammad Ben Abd-ar-Rashid-as-Sajawandi, but at what precise time is uncertain. The Sirajiyah has been commented upon by a vast number of writers upwards of forty being enumerated in the *Kashf-az-Zunun*. The most celebrated of these commentaries, and the one most generally employed to explain the text, is the Sharifiyah by Sayyid Sharif Ali Ben Muhammad-al-Jurjani, who died in A. H. 814 (A. D. 1411)."—Introduction to Morley's Digest of Indian Cases, Vol. I, p. cclxxxi.

See also *Kashf-uz-Zunun*, Vol. IV, p. 358 (Leipzig.)

Fath-ul-Kadir (Lucknow)—

"The Fath-al-Kadir lil Aajiz-al-Fakir, by Kamal-ad-Din Muhammad-as-Siwasi, commonly called Ibn Hammam, who died in A. H. 861 (A. D. 1456), is the most comprehensive of all the comments on the Hidayah, and includes a collection of decisions which render it extremely useful."—Introduction to Morley's Digest of Indian Cases, Vol. I, pp. cclxix—cclxx.

"The Futh-ool-Kudeer is preferable to the whole as an ample collection of cases (rendering it equal in this respect to a Futawa), expressed with suitable brevity of language."—Harington's Analysis of the Bengal Regulations, Vol. I, p. 239.

See also *Kashf-uz-Zunun*, Vol. VI, p. 484 (Leipzig.)

Hamavi (Lucknow, 1294 A. H.)—

A commentary on Ashbah-wan-Nazair by Ahmed bin Mohamed-ul-Hamavi, 1090, A. H.

Hidayah (Lucknow, 1290 A. H.)—

"The text of the Hidayah was published in the original Arabic at Calcutta in A. H. 1234 (A. D. 1818), and was again edited, together with its commentary, the Kifayah, by Hakim Moulavi Abdal-Majid in 1834."—Introduction to Morley's Digest of Indian Cases, Vol. I, p. cclxviii.

"The Hidayah is so well-known, from the English version of it, made by Mr. Charles Hamilton, and published in the year 1791, that it will be unnecessary to say much of it. The Kazee-ool-Koozat, in his catalogue of books already adverted to, describes it in the following terms: 'The Hidayah is a commentary upon the Bidayut-ool-Moobtudee, and both the text and comment were composed by Shykh Boorhan-oo-

Deen Alee, son of Abu Bukr, of Murgheenah, who lived to the age of sixty-two; and, after employing thirteen years in the composition of the latter work, departed from this world A. H. 593. The general arrangement, and divisions of it, are adopted from the *Jama-i-Sugheer* of Imam Mohummud. It is celebrated amongst the learned for its selection of law cases, and connection of them with the proofs and arguments by which they have been determined. Wherefore in every age it has been esteemed by lawyers; many of whom have written comments and annotations upon it.' It is spoken of in nearly the same language, by the author of the *Kushf-oo-Zunoon*, who adds 'it is a rule observed by the composer of this work to state first the opinions and arguments of the two disciples (Aboo Yoosuf and Imam Mohummud); afterwards the doctrine of the great Imam (Aboo Huneefah); and then to expatiate on the proofs adduced by the latter, in such manner as to refute any opposite reasoning on the part of the disciples. Whenever he deviates from this rule it may be inferred that he inclines to the opinion of Aboo Yoosuf and Imam Mohummud. It is also his practice to illustrate the cases specified in the *Jama-i-Sugheer*, and by Kudooree: intending the latter, whenever he uses the expression he has said in the book. In praise of the *Hidayah*, it has been declared, like the *Koran*, to have superseded all previous books on the law; that all persons should remember the rules prescribed in it; and that it should be followed as a guide through life.' This eulogium on the *Hidayah* is confirmed in a paper written by Moulavee Mohummud Rashid, one of the *Mooftes* of the Supreme Court of Judicature and Courts of *Sudr Deewanee* and *Nizamut Adalut*, as well as one of the most learned Mosulmans in India, who remarks on the text, and some of the principal comments, to the following effect. 'No text or commentary now extant, can be compared with the *Hidayah* as a digest of approved law cases, illustrated by the proofs and arguments which establish them.' It is therefore, with its comments, fit to be the standard of legal decision in the present times. Many commentaries have been written upon it: but four only, the *Nihayah*, *Inayah*, *Kifayah* and *Futh-ool-Kudeer*, are forthcoming in Bengal. The *Nihayah* was first composed: and has superior credit as being the original from which the others have borrowed. But the author of the *Inayah* has merited esteem by his studious analysis; and interpretation of the letter and meaning of the *Hidayah*. The *Kifayah* also deserved commendation, from its concise statement of the substance of other commentaries, as well as from some additions to them."—*Harington's Analysis of the Bengal Regulations*, Vol. I, pp. 237—239.

See also *Kashf-uz-Zunoon*, Vol. VI, p. 479 (Leipzig).

Jami-ur-Rumuz (Lucknow, 1301, A. H.)—

“The last commentary (on the Nikayah) written by Shams-ud-Din Muhammad-al-Khurasani Al-Kohistani in A. H. 941 (A. D. 1534), is entitled the Jami-ur-Rumuz, which is the fullest and the clearest of the lot, as well as one of the most useful law books frequently referred to in this country. This work was for several years adopted for study in the first and second classes of the Calcutta Madrassah.”—Tagore Law Lectures, 1873, pp. 44—45.

Jawahir-i-Nayerah (Delhi)—

A commentary on the *Kuduri* by Abu Bakr bin Ali-ul-Haddadi-ul-Abbadi, 800, A. H.

Kunz-ul-Dukaik (Bombay)—

“The Kunz-ul-Dukayik has been already mentioned, as composed by Hafiz-oo-Deen, author of the *Kafee* and *Wafee*. It is a short general treatise of law, used in Mosulman Colleges, as an elementary book of instruction ; but superseded, as a book of reference for legal exposition, by its commentaries ; of which the following are extant in India. The *Tubieen-ool-Hukayik*, by Fukr-oo-Deen Aboo Mohummud Osman of Zyla, who died in A. H. 743. His comment is valued by the followers of Aboo Huneefah, as containing a complete refutation of the opposite doctrine of Shafiee. The *Buhr-oo-Rayik*, by the learned Zyn-ool-Aabideen Ibn-i Nujeem, of Egypt, left incomplete at his death, A. H. 970 ; and unequally finished by his brother Siraj-oo-Deen Omur, who also wrote a commentary entitled the *Nahr-i-Fayik*, but of inferior merit to that of Zyn-ool-Aabideen, which is held in the utmost estimation ; and is spoken of in the *Kushf-oo-Zunoon* as equalled only by the *Futh-ool-Kadeer*, Ibn-i-Homam’s commentary on the *Hidayah*. The *Mutlub-i-Fayik*, or, as more generally called *Aynee*, by Budr-oo-Deen Mohummud Aynee, of Dubur in Arabia. This commentary is also esteemed, as containing an ample collection of law cases ; and though surpassed, in this respect by *Buhr-i-Rayik* it has the advantage of having been brought to the conclusion by the author ; whose erudition obtained him the title of *Ulamah*, in common with Zyn-ool Aabideen.

Another commentary on the *Kunz-ul-dukayik*, entitled *Maadun*, is known in India. But the name of the author has not been ascertained. The *Eezab* by Shykh Yahaya and *Rumz-ool Hukayik* by Kazee Budr-oo-deen Mahmood, are also noticed, with the names of some other commentators, in the *Kushf-oo-Zunoon* ; but they are not celebrated, or quoted as authorities. The court of Nizamut Adalut possess an incomplete copy of the *Buhr-oo-Rayik* ; on which the Kazee-ool-Koozat remarks (in his

catalogue) that "it comprises a compilation of cases, general and particular ; with the useful result of the author's researches upon a variety of legal questions ; and is received as authentic by the followers of Aboo Huneefah in every city of Islam."—Harington's Analysis to the Bengal Regulations, Vol. I, p. 239—240.

"An-Nasafi is also the author of the *Kanz-ad-Dakaik*, a book of great reputation, principally derived from the *Wafi*, and containing questions and decisions according to the doctrines of Abu Hanifah, Abu Yusuf, the Imam Muhammad, Zufar, Ash-Shafii, Malik and others. Many commentaries have been written on his work : the most famous is the *Bahr-ar-Raik*, which may, indeed, almost be said to have superseded it in India."—Introduction to Morley's Digest of Indian Cases, Vol. I, p. cclxx.

See also *Kashf-uz-Zunun*, Vol. V, p. 249 (Leipzig).

Kurat-ul-Ayoon (Egypt, 1307 A. H.)—

A supplemental commentary on *Durrul-Mukhtar* by Mohamed Alauddin Effendi bin Shaikh Mohamed Ameen, better known as *Ibu Abideen*.

Munhat-ul-Khaliq (Egypt, 1307 A. H.)—

A marginal commentary on *Radd-ul-Muhtar* by Mohamed Ameen, better known as *Ibn Abideen*, 1252, A. H.

Radd-ul-Muhtar (Egypt, 1307, A. H.)—

"Another commentary on the *Durrul-Mukhtâr* is the *Radd-ul-Muhtâr*. The *Radd-ul-Muhtâr* is composed by Muhammad Amin, known by the name of *Ibnu Abidin*, and printed in Egypt, A. H. 1286, in five volumes of 4to size. This great work is occasionally referred to in this country."—Tagore Law Lectures, 1873, p. 46.

Sharh-i-Vikayah (Lucknow, 1323 A. H.)—

"The *Vikayah* which was written in the seventh century of the *Hijrah*, by *Burhan-ash-Shariyat Mahmud*, as an introduction to the study of the *Hidayah*, has been comparatively eclipsed by its Commentary, the *Sharh-i-Vikayah*, by *Ubaid Allah Ben Masuud*, who died in A. H. 750 (A. D. 1349): this author's work combines the original text with a copious glossary explanatory and illustrative."—Introduction to Morley's Digest of Indian Cases, Vol. I, pp. cclxx—cclxxi.

"The text of the *Vikayah*, composed in the seventh century of the *Hijrah*, by *Boorhan-oo-Shureeut Mahmood*, son of the first *Sudr-oo-Shureeut*, like that of the *Kunz-oo-Dukayik*, has been superseded, for legal consultation, by its more extensive commentaries ; especially by that of the

second Sudr-oo-Shureeut, Obydoollah bin-i-Musaood, who died A. H. 750, distinguished by the title of Sharh-i-Vikayah; and combining, with the original treatise, an ample comment in illustration of it. But both are used in Mussulman colleges, for instruction in the science of law, preparatory to the study of the Hidayah; upon which the Vikayah is founded; being, as its title at length imports (Vikayah-oo-Riwayah, fee Musaeel-il-Hidayah), the Custos, guardian or preserver, of the reports of cases in the Hidayah. Other commentaries are mentioned in the Kushf-oo-Zunoon; but they are not known to be extant in India; or quoted as authorities."—Harington's Analysis to the Bengal Regulations, Vol. I, pp. 240—241.

Tafsirat-ul-Ahmedia (Bombay, 1300 A. H.)—

A comprehensive commentary on the Koran by the well-known scholar Mulla Jeewan, 1130, A. H.

Tahtavi (Egypt, 1254, A. H.)—

"The most celebrated of the commentaries written on Durrul-Mukhtâr is the 'Tahtavi,' a work used in this country."—Tagore Law Lectures, 1873, p. 46.

Tankihul Hamidiah (Egypt, 1310)—

A treatise on Mussalman jurisprudence by Ibn Abideen, 1252, A. H.

Umdat-ul-Riayah (Lucknow)—

A commentary on Sharh-i-Vikayah written by Moulana Abdul Hai of Lucknow.



CORRIGENDA.

Page	1	Last line <i>for</i> 'Law' <i>read</i> 'Laws.'
"	2	line 25 <i>for</i> 'XVII of 1876' <i>read</i> 'XVIII of 1876.'
"	4, 24, 26, 27, 29, 30, 88, 150, 175,	Foot-note, <i>for</i> 'Art. 482' <i>read</i> 'Art. 553' <i>for</i> 'Art. 495' <i>read</i> 'Art. 566.'
"	38	line 28 place a colon after 'consideration.'
"	38	foot-note 1, <i>for</i> 'Prophed' <i>read</i> 'Prophet.'
"	46	line 12 <i>for</i> 'All.' <i>read</i> 'All., 77.'
"	46	lines 26, 27 <i>for</i> 'one' <i>read</i> 'she.'
"	61	line 31 <i>for</i> 'wife' <i>read</i> 'a wife.'
"	63	line 6 <i>for</i> 'I. L. R., All.' <i>read</i> 'I. L. R., 6 All.'
"	75	In marginal notes of Art. 123 <i>for</i> 'Christian' <i>read</i> 'Christian wife.'
"	79	lines 5, 8 <i>for</i> 'he' <i>read</i> 'it,' and <i>for</i> 'his' <i>read</i> 'its.'
"	98	line 20 <i>omit</i> the word 'of' before 'her travelling expenses.'
"	99	after the line 8 <i>add</i> 'See section 245-A of the Code of Civil Procedure (Act XIV of 1882).'
"	101	In marginal notes of Art. 175 <i>for</i> 'must be husband's calling' <i>read</i> 'must be regulated by husband's calling.'
"	105	In marginal notes of Art. 185 <i>for</i> 'another' <i>read</i> 'another wife.'
"	111	line 28 <i>omit</i> the words 'See the Indian Limitation Act (XV of 1877).'
"	112	after line 10 <i>add</i> the words 'See <i>Rashid Karmali v. Sherbanoo</i> , I. L. R., 29 Bom., 85 (1904).'
"	148	line 14 <i>for</i> 'or' <i>read</i> 'and,' and also in marginal note <i>for</i> 'or' <i>read</i> 'and.'
"	160	line 2 <i>for</i> 'paying' <i>read</i> 'receiving.'
"	165	last but one line <i>for</i> 'are' <i>read</i> 'is.'
"	172	after line 13 <i>add</i> 'See Act XXI of 1850.'
"	199	line 17 <i>omit</i> the word 'if.'
"	217	line 5 <i>for</i> 'him' <i>read</i> 'it.'
"	220	line 1 <i>for</i> 'born' <i>read</i> 'born and married.'
"	232	line 1 <i>for</i> 'of age' <i>read</i> 'adults.'
"	248	line 28 <i>for</i> 'prevailed' <i>read</i> 'prevail.'
"	291	In marginal notes of Art. 501 <i>omit</i> 'made.'
"	292	line 28 <i>for</i> 'Creditors whose debts were before the last contracted' <i>read</i> 'Creditors whose debts were contracted before the last.'
"	293	line 22 <i>for</i> 'will last' <i>read</i> 'last will.'
"	323	line 24 <i>for</i> '12 All.' <i>read</i> '2 All.'

INSTITUTES OF MUSSALMAN LAW.

BOOK I.

MARRIAGE.

(Arts. 1—149.)

CHAPTER I.

PROPOSALS OF MARRIAGE.

(Arts. 1—4.)

Art. 1. A proposal of marriage may be made to any woman who is free from the marriage tie and from *Iddat*.¹

When a proposal of marriage can be made to a woman.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 671.

Zaidu-nil-Ambani, Vol. 1, p. 3.

The chapter entitled “Women” deals with matters relating to women, marriage, divorce, dower, &c.—Sale’s Koran, Chap. IV, p. 59.

Where a Mahomedan married woman is not repudiated by her husband, she is not entitled legally to marry another—*Ameena v. Kuttoo Khan*, 7 Sel. Rep., S. D. A., 32 (1842).

Nor even a proposal of marriage can be made to a woman who is a married woman—See Dec. Mad. S. D. A., 157 (1855).

In suits regarding marriage and caste, and all religious usages and institutions, the Mahomedan Law with respect to

¹ Retreat or term of probation, see Art. 310.

Mahomedans are to be considered as the general rule by which judges are to form their decisions, and their Lordships of the Privy Council could conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision, that their law, the application of which has been secured to them, is to be overridden upon a question which so materially concerned their domestic relations—*Buzloor Ruheem v. Shumsoonnissa Begum*, 11 M. I. A., 614 (1872).

In India the personal law of Mussalmans on marriage has been made applicable to Mussalmans by Statutes and Acts :

The Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), section 37, is as follows :—

(1) Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding . . . marriage or caste or any religious usage or institution, the Mahomedan Law in cases where the parties are Mahomedans, . . . shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

(2) In cases not provided for by sub-section (1), or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.

See The Punjab Laws Act (IV of 1872), s. 5, amended by Act XII of 1878, s. 1 ; The Madras Civil Courts Act (III of 1873), s. 16 ; The Central Provinces Laws Act (XX of 1875), s. 5 ; The Oudh Laws Act (XVII of 1876), s. 3 ; The Lower Burma Courts Acts (XI of 1889, s. 4 and VI of 1900) ; Bombay Regulation IV of 1827, s. 28. See also 21 Geo. III, Chap. 70.

In Bengal, Act I (B. C.) of 1876, provides for the voluntary registration of Mahomedan marriages and repudiations.

A proposal of marriage cannot be made to a woman who is observing *Iddat*.

Art. 2. It is not lawful to openly propose marriage to a woman while she is observing *Iddat*,¹ consequent upon either a revocable or irrevocable repudiation,² or upon widowhood. It is, however, allowable to express a desire to obtain a widow's hand, though it is not lawful to enter into a contract of marriage with her until the period of her *Iddat* has expired.

¹ See Art. 310.

² See Art. 217.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 671; Fatawa-i-Alam-giri, Vol. 2, p. 9.

Baillie, Bk. 4, Chap. 13, p. 358; Zaidu-nil-Ambani, Vol. 1, p. 5.

Marriage with a woman within 4 months and 10 days (*Iddat*) from her husband's death is invalid—Dec. Mad. S. D. A., 157 (1855).

Art. 3. A suitor is allowed to see the face and hands of the woman to whom he proposes marriage.

A suitor can see the face and hands of the woman to whom he proposes marriage.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 258.

Zaidu-nil-Ambani, Vol. I, p. 8.

Art. 4. No marriage is complete without declaration and acceptance. Promises of marriage, the reading of *Al Fatiha*, or the entering into an agreement are not sufficient. Where such promises are made or the agreement entered into, each party may retract even after acceptance by the woman, or by her guardian¹ if she is a minor, and even after the intended husband has made presents with a view to marriage, or has paid the whole or part of the stipulated dower.²

Mere promise of marriage does not constitute marriage.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 290; Sharh-i-Vikaya, Vol. 2, p. 4.

Maen. Prin., Chap. 8, s. 1, p. 56; Zaidu-nil-Ambani, Vol. 1, p. 9.

Al Fatiha : See Sale's Koran, Chap. I, p. 1.

A written agreement does not, as a rule, constitute a contract of marriage; it is only one of the modes of proving it—Clavel, Vol. 1, p. 10.

¹ See Art. 33.

² See Art. 70.

CHAPTER II.

CONDITIONS REQUISITE FOR A VALID MARRIAGE, AND THE LEGAL EFFECTS OF MARRIAGE.

(Arts. 5—18.)

Declaration and acceptance are essential in a valid marriage.

Art. 5. Marriage is legally contracted by a declaration made by one contracting party and by acceptance proceeding from the other.

The declaration may be made by either the man or the woman, or by their guardians when the contracting parties are minors or legally incompetent¹. Where the parties are legally competent, the declaration may be made by their agents².

Notes.

Durrul-Mukhtâr, Vol. 2, p. 1 ; Radd-ul-Muhtâr, Vol. 2, p. 285.

Baillie, Bk. 1, Chap. 1, p. 4 ; Hamilton's Hedayah, Bk. 2, Vol. 1, Chap. 1, p. 25 ; Macn. Prin., Chap. 7, s. 2, p. 56 ; Zaidunil-Ambani, Vol. 1, p. 10 ; Clavel, Vol. 1, pp. 14, 35.

Articles 27 and 132 of the text clearly show that marriage contracted during the period of *Iddat*, is absolutely null and void, whether there had been cohabitation or not. Article 2 does not permit even of proposing marriage to a woman while she is observing *Iddat*—Clavel, Vol. 1, p. 17.

It is enacted by section 11 of the Indian Contract Act (IX of 1872), that every person is competent to contract, who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

¹ See Arts. 482, 495.

² See Art. 57.

By section 2 of the Indian Majority Act (IX of 1875), the capacity of a Mahomedan in the matter of marriage is not affected, and he, being subject to his own personal law, is entitled to enter into a contract of marriage when he has attained puberty. The age of puberty, according to Mahomedan law, depends on the physical signs which denote that state, and when no such signs are visible, the age of majority in either sex is fixed on the completion of the 15th year.

When a child is given in marriage by any person other than the father or grandfather, he or she has the option of either ratifying it or repudiating it on attaining puberty—*Badal Aurat v. Queen-Empress*, I. L. R., 19 Cal., 79 (1891).

It is essential according to Mahomedan law that the husband should be capable of giving a valid consent, or should be represented by some one who can lawfully consent on his behalf ; and that the girl also when a minor should be represented by a duly authorized person for the purpose of binding her—*Sobrat v. Jungli*, 2 C. W. N., 245 (1898).

Consent of a Muslim girl who is of age is essential to make the marriage valid—*Asgur Ali v. Muhabbat Ali*, 22 W. R., 403 (1874).

Although neither writing nor any religious ceremony is necessary to the validity of a marriage contract, words of proposal and acceptance must be uttered by the contracting parties or their agents in each other's presence and hearing, and in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Muslims, and the whole transaction must be completed at one meeting—*Aklemannissa Bibi v. Mahomed Hatem*, I, L. R., 31 Cal., 849 (1904).

Although marriage is a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of one, and the acceptance or consent of the other, of the contracting parties or of their natural and legal guardians before competent and sufficient witnesses :—*Abdul Kadir v. Salima*, I. L. R., 8 All., 149, F. B., *per* Mahmood, J. (1886).

The betrothal made by a father cannot be annulled by a daughter on her coming of age—*Fukhrunnissa v. Ally Raza*, 6 Sel. Rep., S. D. A., 368 (1840).

The *nikah* form of marriage is well known and established amongst Mahomedans :—*Moneerooddeen v. Ramdhun Bajeekur*, 18 W. R. Cr., 28, *per Kemp, J.* (1872).

See *Kunhi v. Moidin*, I. L. R., 11 Mad., 327 (1888) ; *Hamidunnissa v. Zohiruddin Sheik*, I. L. R., 17 Cal., 670 (1890) ; *Hub Ali v. Wazir-un-nissa*, I. L. R., 28 All., 496 (1906).

Both declaration and acceptance must be heard and expressed at the same meeting.

Art. 6. Where both the contracting parties are present, the declaration and acceptance must be expressed at the same meeting, however long it may last : otherwise the marriage is not valid. It is essential also that the attention of the contracting parties should not be distracted by any other occupation.

It is necessary that each party should hear the words of the other, which may even be uttered in a foreign language, so long as both parties know that marriage is being contracted.

It is necessary also that the acceptance in no way varies from the declaration.

Notes.

Durrul-Mukhtâr Vol. 2, p. 2 ; *Radd-ul-Muhtâr*, Vol. 2, p. 288 ; *Fatawa-i-Kazi Khan*, p. 152.

Baillie, Bk. 1, Chap. 1, pp. 5, 10, 11 ; *Macn. Prin.*, Chap. 7, s. 3, p. 6 ; *Zaidu-nil-Ambani*, Vol. 1, p. 16.

Marriage must be completed at one meeting—*Aklemannissa Bîbi v. Mahomed Hatem*, I. L. R., 31 Cal., 849 (1904).

Art. 7. A marriage is not valid unless it is contracted in the presence of two male witnesses, or of one male and two female witnesses.

The witnesses must be adult, of sound mind, and Muslims. They must hear the speech of both the parties and must be aware that marriage is being

Presence of witnesses essential and the qualifications such witnesses must possess.

contracted. They may be blind, profligate, descendants of both the parties or of one of them.

A deaf man cannot act as witness to marriage : nor will a marriage contract be valid, if made in the presence of a witness who is asleep or intoxicated, and therefore unable to understand what he heard.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 2 ; Radd-ul-Muhtâr, Vol. 2, p. 295 ; Fatawa-i-Sirajiah, p. 208.

Baillie, Bk. 1, Chap. 1, pp. 5, 6 7 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 26 ; Macn. Prin., Chap. 7, ss. 3, 5, p. 56 ; Zaidunil-Ambani, Vol. 1, p. 17.

See Sections 118 and 134 of the Indian Evidence Act (I of 1872).

As to the Mahomedan law of Evidence having ceased to have any validity in Indian Courts, see the Report of the Commissioners appointed to prepare a body of substantive law for India ; See also *Queen v. Khyroollah*, 6 W. R., Cr. 21, F. B., per Peacock, C. J. (1866).

When both parties are Mussalmans, marriage cannot be contracted, but in the presence of two male witnesses or of one man and two women—*Butoolun v. Koolsoom*, 25 W. R., 444 (1876).

A suit for jactitation of marriage lies in a Civil Court in India—*Azmat Ali v. Mahmud-ul-Nissa*, I. L. R., 20 All., 96, per Edge, C. J. (1897).

See *Hukeem Wahid Ali v. Khan Beebee*, 3 Sel. Rep., S. D. A., 136 (1821) ; *Kureemmonnissa v. Mohabut Khan*, Dec. S. D. A., 356 (1851) ; *Mahtala Bibee v. Ahmed Haleemoozooman*, 10 Cal. L. R., 293 (1881).

Art. 8. When a father contracts for the giving of his adult daughter in marriage, with her consent and in her presence, one male witness or two female witnesses are sufficient to render the marriage valid.

One male or two female witnesses necessary when a father gives his adult daughter in marriage.

This provision also applies when the father is present at the marriage of his minor daughter, whom

he has authorized a third party to contract in marriage.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 2.

Baillie, Bk. 1, Chap. 1, p. 9 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 27 ; Zaidu-nil-Ambani, Vol. 1, p. 20.

When a written contract necessary.

Art. 9. When both parties are present, the declaration and acceptance must be expressed verbally.

When the proposing party is absent, and makes his proposal of marriage in writing, the woman to whom it is addressed must read it out to the witnesses or inform them that such a person has written to her proposing marriage, and she must at the same meeting express her acceptance.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 1 ; Radd-ul-Muhtâr, Vol. 2, p. 287.

Baillie, Bk. 1, Chap. 1, p. 11 ; Maen. Prin., Chap. 7, s. 6, p. 56 ; Zaidu-nil-Ambani, Vol. 1, p. 22.

Marriage of the dumb.

Art. 10. The marriage of the dumb is validly contracted by signs, provided the signs used clearly indicate a desire to be married.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 294.

Baillie, Bk. 1, Chap. 2, p. 14.; Zaidu-nil-Ambani, Vol. 1, p. 23.

Marriage valid without settlement of dower.

Art. 11. Marriage contracted without the amount of the dower being fixed, or without settlement of any dower¹ at all, is none the less valid, and the contract entitles the wife to her proper dower.²

¹ See Art. 12.

² See Art. 78.

Notes.

Sharh-i-Vikaya, Vol. 2, p. 33.

Zaidu-nil-Ambani, Vol. 1, pp. 33-34.

It is not necessary by Mahomedan law that dower should be agreed upon before marriage : it may be fixed afterwards—*Kamar-un-nissa Bibi v. Hussaini Bibi*, I. L. R., 3 All., 266, P. C. (1880).

For widow's possession of property in lieu of dower, see *Nowsha Begum v. Umrao Begum*, 7 N.-W. P., H. C. R., 60 (1878).

A widow is entitled to a lien for whatever dower remains due to her, although there may be a dispute as to what is the amount actually due—*Ahmed Husain v. Khadija*, 3 B. L. R., A. C., Foot-note, 28 (1868).

Art. 12. Marriage is not valid when contracted subject to a condition or circumstance, the realisation of which is uncertain. Marriage subject to a condition.

When it is contracted under an illegal condition, the marriage is valid and the condition void ; such would be the marriage in which the husband stipulates that there should be no dower.¹

Notes.

Durrul-Mukhtâr, Vol. 2, p. 4.

Baillie, Bk. 1, Chap. 2, pp. 17, 19 ; Zaidu-nil-Ambani, Vol. 1, p. 25.

Art. 13. Temporary marriage or marriage in *Mutah* form, the duration of which is limited to a fixed period, cannot be validly contracted. Temporary or *Mutah* marriage is void.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 4.

Baillie, Bk. 1, Chap. 2, p. 18 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 33 ; Zaidu-nil-Ambani, Vol. 1, p. 27 ; Clavel, Vol. 1, p. 116.

¹ See Art. 11.

According to the Sunni school of Mahomedan law, a marriage contracted under the form of *Mutah* is void, but according to the Shiah school such a marriage is perfectly valid—In the matter of the petition of *Luddun Sahiba*, I. L. R., 8 Cal., 736 (1882).

See also *Mahomed Abid Ali Kumar Kadar v. Ludden Sahiba*, I. L. R., 14 Cal., 276 (1886).

Neither party inherits in a temporary marriage.

Art. 14. The marriage contracted under the form of *Mutah*, or mere enjoyment is void. Neither of the parties inherits from the other, even when the marriage is contracted in the presence of witnesses.

Notes.

Radd-ul-Muhtâr Vol. 2, p. 318 ; Fatawa-i-Alam-giri, Vol. 2, p. 11.

Baillie, Bk. 1, Chap. 2, p. 18. Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 33 ; Zaidunil-Ambani, Vol. 1, p. 27.

Marriage by exchange is valid.

Art. 15. A marriage by exchange is valid, and each wife is entitled to the proper dower.¹

A marriage by exchange is one in which a man gives his daughter or his sister in marriage to another man without dower, at the same time marrying the sister or daughter of the latter as compensation.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 18.

Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 47 ; Zaidunil-Ambani, Vol. 1, p. 29.

Contracting parties cannot reserve option or impose conditions.

Art. 16. The contracting parties in a marriage cannot reserve any option with regard to seeing each other, nor can they impose any other conditions whatsoever.

¹ See Arts. 77, 78.

If the husband, verbally or in writing, stipulates in the marriage contract for beauty or virginity in the woman, or for the absence of any fault in her, and makes such stipulation a condition of his union with her, or if the wife on the other hand stipulates for the total absence of any malady or infirmity in her husband, the contract remains valid, and the stipulation is null and void. Neither party can demand the cancellation¹ of the marriage in the event of the non-fulfilment of the conditions stipulated for.

A wife only has the option of having the marriage cancelled when her husband proves to be impotent.²

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 5 ; Jami-ur-Rumuz, p. 249.

Baillie, Bk. 1, Chap. 2, p. 21 ; Zaidunil-Ambani, Vol. 1, p. 30.

Art. 17. As soon as the marriage is validly contracted, the marriage ties are established, and the rights and duties of the married parties³ commence, even before consummation. A valid marriage contract renders the husband liable towards the wife for the proper dower,⁴ in default of any stipulated dower, and obliges him to maintain⁵ her so long as she is not rebellious,⁶ or not too young for sexual intercourse or to be a companion to him in his house. It also renders lawful sexual intercourse between the parties, assures the husband marital authority,⁷ and makes it binding upon the wife to accede to her husband's desire where such desire is lawful ; it prevents her leaving her husband's house without his permission or without reasonable excuse. Such a contract

Legal effects
of marriage.

¹ See Art. 48.

² See Art. 298.

³ See Art. 206.

⁴ See Art. 78.

⁵ See Art. 166.

⁶ See Art. 171.

⁷ See Art. 206.

further enjoins on her the duty of properly performing the household duties after having received in full the prompt part of the dower;¹ it also creates affinity and the prohibitions arising therefrom,² and finally it entitles each party to inherit from the other.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 279, 280, 362, 363 388, 699, 701 ; Bahrr-ul-Rayek, Vol. 3, pp. 83, 84.

Baillie, Bk. 1, Chap. 1, p. 13 ; Macn. Prin., Chap. 7, s. 7, p. 57 ; Zaidunil-Ambani, Vol. 1, p. 36 ; Clavel, Vol. 1, pp. 8, 55.

This Article leaves no room for any controversy on the conclusive effects of the marriage independently of consummation. Once the marriage is validly contracted the ties of marriage are secured, the rights and duties of husband and wife commence even before consummation—Clavel, Vol., 1, p. 48.

See Section 488 of the Code of Criminal Procedure (Act V of 1898) ; *Abdur Rohoman v. Sakhina*, I. L. R., 5 Cal., 558 (1879). In the matter of the petition of *Din Muhammad*, I. L. R., 5 All., 226 (1882) ; In the matter of the petition of *Luddun Sahiba*, I. L. R., 8 Cal., 736 (1882).

On the legal effects of marriage, Mahmood, J., says :—“ These authorities leave no doubt as to what constitutes marriage in law, and it follows that, the moment the legal contract is established, consequences flow from it naturally and imperatively as provided by the Mahomedan law. I have said enough as to the *nature* of the contract of marriage, and in describing its necessary legal effects I cannot do better than resort to the original text of the *Fatawa-i-Alamgiri*, which Mr. Baillie has translated in the form of paraphrase, at page 13 of his digest, but which I shall translate here literally, adopting Mr. Baillie's phraseology as far as possible :—‘ The legal effects of marriage are that it legalizes the enjoyment of either of them (husband and wife) with the other in the manner which in this matter is permitted by the law ; and it subjects the wife to the power of restraint, that is, she

¹ See Art. 73.

² See Arts. 19, 20.

becomes prohibited from going out and appearing in public ; it renders her dower, maintenance, and raiment obligatory on him ; and establishes on both sides the prohibitions of affinity and the rights of inheritance, and the obligatoriness of justness between the wives and their rights, and on her it imposes submission to him when summoned to the couch ; and confers on him the power of correction when she is disobedient or rebellious, and enjoins upon him associating familiarly with her with kindness and courtesy. It renders unlawful the conjunction of two sisters (as wives) and of those who fall under the same category.'

That this conception of the mutual rights and obligations arising from marriage between the husband and wife bears in all main features close similarity to the Roman law and other European systems which are derived from that law, cannot, in my opinion, be doubted ; and even regarding the power of correction, the English law seems to resemble the Mahomedan, for even under the former 'the old authorities say the husband may beat his wife' ; and if in modern times the rigour of the law has been mitigated, it is because in England, as in this country, the criminal law has happily stepped in to give to the wife personal security which the matrimonial law does not. To use the language of the Lords of the Privy Council in the case already cited :— 'The Mahomedan law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following :— 'There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it.' 'The Court', as Lord Stowell said in *Evans v. Evans*, 'has never been driven off this ground.'

Now the legal effects of marriage, as enumerated in the *Fatawa-i-Alamgiri*, come into operation as soon as the contract of marriage is completed by proposal and acceptance ; their initiation is simultaneous, and there is no authority in the Mahomedan law for the proposition that any or all of them are dependent upon any condition precedent as to the payment of dower by the husband to the wife."—*Abdul Kadir v. Salima*, I. L. R., 8 All., 149, F. B. (1886).

Effect of marriage contracted without witnesses or legal conditions.

Art. 18. Every marriage contracted without witnesses¹ or without one of the conditions requisite for the validity of a marriage is radically void,² and failing the voluntary separation of the parties must be cancelled by a judge.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 379—389; Fatawa-i-Alamgiri, Vol. 2, p. 40.

Baillie, Bk. 1, Chap. 8, p. 155; Zaidunil-Ambani, Vol. 1, p. 37; Clavel, Vol. 1, p. 113.

A marriage, contracted without witnesses, produces no effect. When cancelled before cohabitation or any equivalent act, it creates no prohibition of affinity, nor does it entitle the survivor to inherit from the party dying first. Where the husband has settled no dower in the contract and the marriage is cancelled after actual consummation or after the disappearance of the wife's virginity, the wife is entitled to her proper dower—*Butoolun v. Koolsoom*, 25 W. R., 444 (1876).

Cohabitation as husband and wife would be evidence of a marriage if the parties were Mahomedans, or persons between whom a valid marriage could be celebrated—*Manowar Khan v. Abdullah Khan*, 3 N.-W. P., H. C. R., 177 (1871).

Marriage will be presumed when there has been continued cohabitation and when children have been born during that intercourse—*Kursem-oon-Nissa v. Ata-ool-lah*, 2 Agra, H. C. R., 217 (1867); *Masit-un-Nisa v. Pathani*, I. L. R., 26 All., 295 (1904).

As to personal status of husband and wife at first Christians and subsequently Mahomedans—See *Skinner v. Skinner*, I. L. R., 25 Cal., 537, P. C. (1897).

¹ See Art. 7.

² See Arts. 134, 172.

CHAPTER III.

IMPEDIMENTS TO MARRIAGE.

(Arts. 19—32.)

Art. 19. It is not lawful for a man to marry more than four wives at one time.

A man cannot have more than four wives at one time.

Notes.

Fath-ul-Kadir, Vol. 2, p. 31.

Baillie, Bk. 1, Chap. 3, p. 30 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 31 ; Macn. Prin., Chap. 7, s. 7, p. 57 ; Zaidu-nil-Ambani, Vol. 1, p. 38.

See Sale's Koran, Chap. IV, p. 59

The Mahomedan law prohibits the marrying of more than four wives only in case all four are living—*Shumsoonissa v. Gouher Ali*, 4 Sel. Rep., S. D. A., 359 (1827).

An agreement made by a man not to marry a plurality of wives is not illegal according to Mahomedan law—*Hurron v. Khyroollah*, 1 Fulton's Rep., 361, *per* Ryan, C. J. (1838).

Art. 20. For the validity of marriage it is necessary that there should be no prohibition affecting the parties.

There must be no prohibition affecting the marriage parties.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 1.

Zaidu-nil-Ambani, Vol. 1, p. 40.

Art. 21. Prohibitions are either perpetual or temporary. The causes that produce perpetual prohibitions are legitimate and natural relationship, affinity and fosterage.¹

Perpetual and temporary prohibitions to marriage.

The causes that create temporary prohibitions are as follow :—The union with two women related to one

¹ See Art 377.

another within the prohibited degree;¹ the union with more than four women at one time; the absence of a heavenly and revealed religion;² a final repudiation or one pronounced three times; and the fact that the woman is another man's wife or is observing *Iddat*,³ consequent upon repudiation or widowhood.

Notes.

Fatawa-i-Kazi Khan, pp. 165-167; Fath-ul-Kadir, Vol. 2, p. 16; Fatawa-i-Alamgiri, Vol. 2, p. 11.

Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 29; Macn. Prin., Chap. 7, s. 10, p. 57. Zaidunil-Ambani, Vol. 1, p. 40.

The absence of a heavenly or revealed religion causes temporary prohibition to marriage. Both schools, Shiah and Sunni, prohibit sexual intercourse between a Mahomedan woman and a man who is not of her religion—*Himmat Bahadur v. Sahebzadee Begum*, 14 W. R., 125 (1870).

A Mahomedan woman cannot enter into a contract of marriage with a man who is not a Mussalman—*Bakhshi Kishen Prasad v. Thakur Das*, I. L. R., 19 All., 375 (1897).

Nor can a Mahomedan woman marry a second husband during her first husband's lifetime—*Ameena v. Kuttoo Khan*, 7 Sel. Rep., S. D. A., 32 (1841).

Prohibited
degrees of
relationship
in marriage.

Art. 22. A man is forbidden to marry his mother, his grandmother, how high soever;⁴ his daughter, his son's daughter, or daughter's daughter, how low soever;⁵ his sister, his sister's daughter or brother's daughter, how low soever;⁵ his paternal or maternal aunt.

The corresponding male relations are forbidden to the woman. Marriage is permissible between first cousins.

¹ See Art. 22.

² See Art. 31.

³ See Art. 310.

⁴ Or any woman above her in the direct line of ascent.

⁵ Or any woman below her in the direct line of descent.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 5 ; Fath-ul-Kadir, Vol. 2, p. 16 ; Radd-ul-Muhtâr, Vol. 2, p. 300.

Baillie, Bk. 1, Chap. 3, p. 23 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 27 ; Macn. Prin., Chap. 7, s. 9, p. 57 ; Zaidunil-Ambani, Vol. 1, p. 41.

See Sale's Koran, Chap. IV, pp. 62, 63.

Art. 23. A man is forbidden to marry the daughter of his wife with whom he has consummated marriage, and the mother of the wife with whom he has validly contracted marriage. Other prohibitions.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 2 ; Bahrr-ul-Rayek, Vol. 3, p. 107.

Baillie, Bk. 1, Chap. 3, pp. 24, 226 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, pp. 27, 28, 29 ; Macn. Prin., Chap. 7, s. 9, p. 57 ; Zaidunil-Ambani, Vol. 1, p. 43.

Art. 24. A man, who has had illicit intercourse with a woman, can marry neither her mother nor her daughter, and the woman herself is forbidden to his father and his son. Illicit intercourse constitutes a prohibition to marriage.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 5 ; Radd-ul-Muhtâr, Vol. 2, p. 303.

Baillie, Bk. 1, Chap. 3, p. 30 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 29 ; Zaidunil-Ambani, Vol. 1, p. 45.

Art. 25. Fosterage produces the same impediments as legitimate and natural relationship, with the exceptions mentioned in the Chapter¹ on Suckling. Fosterage produces an impediment to marriage.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 2.

Baillie, Bk. 1, Chap. 3, p. 30 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 28 ; Zaidunil-Ambani, Vol. 1, p. 46.

¹ See Bk. IV Chap. II, S. 1, Arts. 365-374.

Marriage is not valid with the sister, aunt or niece of a wife that is living.

Art. 26. No one can marry the sister, the aunt or the niece of the woman with whom he is still united in marriage, or of the wife that he has repudiated and who has not yet completed the period of *Iddat*.¹ But if the woman who causes the impediment should die or should the marriage be dissolved by repudiation² in any form, the impediment would be removed, and after completion of the *Iddat*, marriage with the above-mentioned women would be lawful.

Notes.

Fatawa-i-Alamgiri, Vol. 2, pp. 7, 8, 9.

Baillie, Bk. 1, Chap. 3, p. 31 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, pp. 28, 29 ; Zaidunil-Ambani, Vol. 1, p. 48.

See Sale's Koran, Chap. IV, entitled 'Women,' p. 59.

According to Mahomedan law a man cannot marry the sister of his wife during the continuance of his union with her—*Shureefoonissa v. Khizuroonissa*, 3 Sel. Rep., S. D. A., 280 (1824).

When a man marries two sisters by one contract, and one marriage is known to precede the other, the marriage which is the later of the two is absolutely void—*Azizunnissa Khatoon v. Karimunnissa Khatoon*, I. L. R., 23 Cal., 130 (1895).

Marriage is not permissible with a woman observing *Iddat*.

Art. 27. Before completion of the prescribed period, marriage is not permitted with a woman in *Iddat*¹, whether such *Iddat* is in consequence of repudiation,² the husband's death, or the cancellation of a void marriage.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 9.

Baillie, Bk. 1, Chap. 3, p. 31 ; Zaidunil-Ambani, Vol. 1, p. 51 ; Clavel, Vol. 1, p. 17.

¹ See Art. 310.

² See Art. 217.

Art. 28. It is not lawful for a man to take back his wife, whom he has repudiated three times,¹ until she has been legally married to another man, who has effected actual consummation of marriage with her and has subsequently repudiated her, or has died, and until she has completed the prescribed period of *Iddat*.²

Re-marriage with a woman repudiated three times

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 128.

Baillie, Bk. 1, Chap. 3, p. 43 ; Zaidunil-Ambani, Vol. 1, p. 53.
See Sale's Koran, Chap. II, p. 27.

Art. 29. It is not lawful to marry a woman in a pregnant condition when the author of the pregnancy is known.

Marriage during pregnancy is unlawful except when the pregnancy is due to illicit intercourse.

But a man may marry a woman pregnant by illicit intercourse, on condition that no cohabitation is permissible until after her delivery, unless it is the man that rendered her pregnant who marries her.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 9.

Baillie, Bk. 1, Chap. 3, p. 38 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 32 ; Zaidunil-Ambani, Vol. 1, p. 52.

Art. 30. Any man having four lawful wives cannot marry a fifth, until he has repudiated one of the four and waited until the period of *Iddat*,² consequent upon such repudiation, has expired.

Marriage with a fifth wife is unlawful until one of the four has been repudiated.

Notes.

Sharh-i-Vikaya, Vol. 2, p. 18.

Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 32 ; Zaidunil-Ambani, Vol. 1, p. 54.

Where a man has married four slave girls, his union with a free woman is not the fifth marriage and therefore valid—

¹ See Art. 248.

² See Art. 310.

Gholam Husun Ali v. Zeinub Beebee, 1 Sel. Rep., S. D. A., 63 (1801).

See *Shumsoonisa v. Goukur Ali*, 7 Sel. Rep., S. D. A., 359 (1827).

Non-Muslim
women who
are lawful to
Muslims.

Art. 31. A Muslim can marry non-Muslim women¹ whose religion is founded on the scriptures, that is to say, Christians or Jewesses settled in Muslim States, or elsewhere.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 10.

Baillie, Bk. 1, Chap. 3, p. 41 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 3 ; Macn. Prin., Chap. 7, s. 12, p. 58 ; Zaidunil-Ambani, Vol. 1, p. 56.

See Sale's Koran, Chap. V, p. 82.

A woman of the Shiah sect, cannot contract a valid marriage with a Christian—*Bakhshi Kishen Prasad v. Thakurdas*, I. L. R., 19 All., 375 (1897).

Fire-wor-
shippers, &c.,
are unlawful.

Art. 32. It is unlawful for a Muslim to marry fire-worshippers, sabæns or star-worshippers, whose religion is not based on any holy book.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 4.

Baillie, Bk. 1, Chap. 3, p. 40 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, p. 30 ; Zaidunil-Ambani, Vol. 1, p. 56.

See Sale's Koran, Chap. II, p. 26.

According to Mahomedan law, both the Sunni and Shiah schools prohibit marriage between a Mussalman woman and a man who is not of her religion—*Himmât Bahadur v. Saheb-zadee Begum*, 14 W. R., 125 (1870).

Continued cohabitation between a Mahomedan and a Hindu woman does not raise presumption of marriage—*Monowar Khan v. Abdoolah Khan*, 3 N.-W. P., H. C. R., 178 (1871).

See In the matter of *Ram Kumari*, I. L. R., 18 Cal., 264 (1891) ; *Abdul Razack v. Jaffer Bindaneem*, L. R., 21 I. A. 56 (1893).

¹ See Art 21.

CHAPTER IV.

GUARDIANSHIP IN MARRIAGE (VILAYA).

(Arts. 33—56.)

SECTION I.—QUALIFICATIONS, NECESSARY FOR, AND DUTIES OF, A GUARDIAN IN MARRIAGE.

(Arts. 33—43.)

Art. 33. A guardian¹ in marriage, must be adult, of sound mind and a Muslim. A profligate person is not disqualified from becoming a guardian.

Necessary
qualifica-
tions of
guardian in
marriage.

Notes.

Durrul-Mukhtâr, Vol. 2, pp. 4, 6.

Zaidu-nil-Ambani, Vol. 1, p. 57.

The father who is an apostate from the Mahomedan faith cannot be the guardian in marriage of his daughter, and consequently his consent is not necessary—In the matter of *Mahin Bibi*, 13 B. L. R., 160 (1874).

See Guardian and Wards Act (VIII of 1890), Chap. III.

Art. 34. The intervention of a guardian is an essential condition to the validity of the marriage of minors, and of adults who are insane, but it is not necessary for the validity of marriage between persons who are adult and of sound mind.

Where the
intervention
of a guardian
in marriage
is necessary.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 5.

Macn. Prin., Chap. 7, ss. 14, 16, p. 58 ; Zaidu-nil-Ambani, Vol. 1, p. 58.

¹ See Art. 44.

The Hanifites hold that a girl who arrives at puberty, without having been married by her father or guardian, is legally emancipated from all guardianship, and can select a husband without reference to his wishes—*Muhammad Ibrahim v. Gulam Ahmed*, 1 Bom. H. C. R., 236, *per* Couch, J. (1864).

Art. 35. The guardians having the right to intervene in the marriage of minors and of adults who are insane, are the nearest *Asab*¹ relations,² following the order of inheritance, the nearer excluding the more remote.³

The father of a family⁴ is the natural guardian of his minor children, failing the father, the guardianship devolves upon the paternal grandfather, then upon the line of collateral male relations, *viz.*, the full-brother, the half-brother by the father's side, the son of the full-brother, the son of the half-brother by the father's side, the full-uncle, the half-uncle by the father's side, the son of the full-uncle, the son of the half-uncle by the father's side.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 6 ; Fatawa-i-Alamgiri, Vol. 2, p. 11.

Baillie, Bk. 1, Chap. 4, p. 45 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, pp. 36, 37, 39 ; Zaidunil-Ambani, Vol. 1, p. 59 ; Clavel, Vol. 1, p. 313.

Art. 36. Failing *Asab* relations, the right of guardianship devolves upon the female line in the following order :—

The mother, paternal grandmother, daughter, granddaughter born of a son or daughter, their descendants, maternal grandfather, full-sister, half-sister by the father's side, uterine brother and sister, their

¹ Agnate.

² See Art. 52.

³ See Art. 139.

⁴ See Art. 44.

The relations who have the right to intervene as guardians in the marriage of minors and adults who are incapable.

Guardianship failing *Asab* relations.

descendants, then upon the other *Zavil Arhams*,¹ viz., the paternal aunt, maternal uncle, maternal aunt, daughters of aunts, their descendants, following the established order.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 6.

Baillie, Bk. 1, Chap. 4, p. 46 ; Hamilton's *Hedayah*, Vol. 1, Bk. 2, Chap. 2, p. 38 ; Maen. Prin., Chap. 7, s. 19, p. 59 ; Zaidunil-Ambani, Vol. 1, p. 61.

The nearer guardian being in jail, and being precluded by his absence from acting as guardian in marriage, the marriage contracted by the mother and grandmother of the minor was held lawful—*Kaloo v. Guriboollah*, 13 B. L. R., 163, *per* Kemp, J. (1868).

In the case of apostacy of father, mother's consent held sufficient—In the matter of *Mahin Bibi*, 13 B. L. R., 160 (1874).

Art. 37. Minors having no near or remote relation, are subject to the guardianship of the ruling authority, or the judge, duly authorized to contract in marriage orphans of either sex, who are within his jurisdiction.

Guardianship failing any relations.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 6.

Baillie, Bk. 1, Chap. 4, p. 46 ; Hamilton's *Hedayah*, Vol. 1, Bk. 2, Chap. 2, p. 39 ; Zaidunil-Ambani, Vol. 1, p. 62.

Art. 38. The executor under a will has no authority to contract his wards in marriage, even though the father in his will should have conferred this power upon him, unless this right is acquired by relationship, or is vested in him by a judge, and no other person exists having preference over him.

Executor cannot interfere in the marriage of wards, unless by right of relationship.

Notes,

Durrul-Mukhtâr, Vol. 2, p. 6.

Baillie, Bk. 1, Chap. 4, p. 48 ; Zaidunil-Ambani, Vol. 1, p. 63.

¹ Uterine relations.

Muslims cannot act as guardians to non-Muslims, except judicially empowered to do so.

Art. 39. Muslims cannot act as guardians to non-Muslims in their marriages, nor in the administration of their property, unless it is in the capacity of ruling authority, or its representative. Non-Muslims can, however, act as guardians to non-Muslims, both in their marriages and in the administration of their property.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 6.

Baillie, Bk. 1, Chap. 4, p. 47 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 38 ; Zaidunil-Ambani, Vol. 1, p. 64.

A remote relation has no preference over a near relation in the marriage of minors.

Art. 40. A remote relation has not the right to contract minors in marriage, if there is a nearer relation fulfilling the necessary conditions for exercising guardianship.

But if the nearer relation is absent and at such a distance that the chosen bridegroom's withdrawal is to be feared before the arrival of the reply, the right of guardian passes to the next nearest relation, who can validly contract the minor's marriage without the nearer relation being able to demand its cancellation. It would be the same if the nearer relation were legally incompetent.¹

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 12 ; Durrul-Mukhtâr, Vol. 2, p. 2.

Baillie, Bk. 1, Chap. 4, p. 49 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 39 ; Zaidunil-Ambani, Vol. 1, p. 64.

Where a near relation refuses a proposal, the judge may contract marriage.

Art. 41. If the nearer relation refuses a proposal of marriage made to his ward, the more remote relation has not the right to contract the ward in marriage.

¹ See Art. 482.

This right is vested in the judge, before whom the complaint is lodged, even when the refusal proceeds from the father. The Judge, on being satisfied that there is no sufficient cause for the refusal, that the husband is suitable¹, and that the dower settled on the girl is equal to the proper dower², shall, himself or by his deputy, contract the marriage in the name of the refusing party. But if the refusal of the proposal was based on good grounds, such as inferiority, either of the husband's condition, or of the dower settled on the girl, the judge cannot give her in marriage against the wish of her relation.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 342.

Baillie, Bk. 1, Chap. 4, p. 50 ; Zaidunil-Ambani, Vol. 1, p. 66 ; Clavel, Vol. 1, p. 54.

Art. 42. Where there are two relations of the same degree, either can validly contract the ward in marriage ; and, so long as the marriage is validly contracted, ratification by the other relation is not necessary.

Either of two relations of the same degree may contract a ward in marriage.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 12.

Baillie, Bk. 1, Chap. 4, p. 49 ; Zaidunil-Ambani, Vol. 1, p. 67.

Art. 43. The judge, empowered to give female orphans in marriage, cannot contract one to himself, nor can he contract her to one of his ascendants or descendants.

A judge cannot marry a female orphan in his charge.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 340.

Baillie, Bk. 1, Chap. 4, p. 47 ; Zaidunil-Ambani, Vol. 1, p. 68.

¹ See Art. 62.

² See Art. 78.

SECTION II.—MARRIAGE OF MINORS AND OF ADULTS, WHO
ARE LEGALLY INCOMPETENT.¹

(Arts. 44–56.)

Power of a
father and
grand-
father with
regard to
compelling
children in
marriage.

Art. 44. The father of a family has the power of compelling his minor children of either sex, to enter into the state of marriage, even when the daughter is not a virgin. This right of compulsion is extended to the paternal grandfather and all other guardians fulfilling the necessary conditions.²

Adults of either sex afflicted with imbecility or habitual madness, and who have been without lucid intervals for a whole month, are judicially in the same position as minors, and like them, are subject to the right of compulsion.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 5.

Baillie, Bk. 1, Chap. 4, p. 46 ; Zaidunil-Ambani, Vol. 1, p. 69.

Where such
marriage re-
mains valid.

Art. 45. Where the father or grandfather contracts in marriage his son, grandson, daughter or granddaughter, they being minors or adults who are legally incompetent, the marriage is valid, and its consequences are binding without any one of the above being able, on reaching majority, to demand its cancelment. This is so, even when the boy suffers loss by the heavy amount of dower paid, or when the girl suffers by the inferior amount settled on her, or by the husband not being her equal.³

It is the same in the case of an insane woman contracted in marriage by her son who is also her guardian.

¹ See Art. 482.

² See Art. 83.

³ See Art. 62.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 56.

Baillie, Bk. 1, Chap. 4, p. 50 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 41 ; Zaidu-nil-Ambani, Vol. 1, p. 70.

Art. 46. Where the father or the grandfather, reputed profligate, compels to enter into the state of marriage his son, grandson, daughter or granddaughter, whether minor or adult who is legally incompetent,¹ and seriously injures the boy by making him pay a dower greater than that which he is bound to provide, or seriously injures the girl by accepting a dower smaller than that which ought to have been settled on her, or if he marries her to a husband not her equal, the marriage shall be invalid.

Where father or grandfather is profligate and occasions loss marriage is invalid.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 56.

Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 37 ; Zaidu-nil-Ambani, Vol. 1, p. 72.

Art. 47. When a guardian, other than the father or grandfather, has a boy or girl placed under his guardianship, and contracts one of them in marriage to an unsuitable person, or causes the ward serious injury by reason of the dower given or accepted, the marriage is invalid, even when it is a judge who has contracted it.

Where the guardian contracts the minor in marriage to an unsuitable person.

Where a guardian marries his ward to a suitable² person and the dower is equal to the proper dower,³ the marriage is valid, but the ward upon attaining majority or when informed of such marriage, is entitled to demand its dissolution, even when the marriage has been consummated.

¹ See Art. 482.

² See Art. 62.

³ See Art. 78.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 6.

Baillie, Bk. 1, Chap. 4, p. 50 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 37 ; Macn. Prin, Chap. 7, s. 18, p. 58 ; Zaidu-nil-Ambani, Vol. 1, p. 73 ; Clavel, Vol. 1, p. 54.

According to Mahomedan law of the Sunni school, a marriage by a minor is voidable only, that is, complete unless avoided by the dissent of the girl on her reaching puberty.

According to the Shiah doctrine, a *fazoolee* marriage requires assent of the minor, after attaining puberty and mature understanding, to perfect it, and that, in the event of death intervening before such assent is given, the marriage remains incomplete. Without the assent of a girl after attaining puberty, the marriage remains imperfect and does not create any rights and obligations.

In the absence of evidence to the contrary, the presumption of Mahomedan law is that a girl attains puberty when she reaches the age of 9 years—*Mulka Jehan v. Mahomed Uskhurree*, L. R., I. A., Sup. Vol., 192 (1873).

See *Khajooroonissa v. Rowshan Jehan*, I. L. R., 2 Cal., 184, P. C. (1876).

Wards compelled in marriage have right of canceling contract at puberty.

Art. 48. If the wards married under compulsion prefer, on attaining puberty, to have their marriage dissolved, they must seek their remedy before a judge.

The judge, after having ascertained that their right has not lapsed, will pronounce the dissolution of the marriage. If one of the parties dies before the judge has pronounced his decision, the survivor¹ is entitled to inherit from the deceased, and the dower settled on the wife remains her property or devolves upon her heirs.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 332.

Baillie, Bk. 1, Chap. 4, p. 50 ; Zaidu-nil-Ambani, Vol. 1, p. 76.

¹ See Art. 271.

Art. 49. Where a woman has the option, upon attaining puberty, of having her marriage cancelled, and upon reaching that age while yet a virgin, still wishes to take advantage of this right, she must protest against the action of her guardian and declare before witnesses that she is free. This declaration must be made at the moment the signs of her puberty become visible, or as soon as she is informed, after reaching puberty, of her marriage which she had hitherto been kept in ignorance of; otherwise she loses her right.

How a woman must exercise this right of option.

Her ignorance of this right, or of the moment at which she ought to exercise it, is not a valid excuse. But having once protested against her marriage before witnesses at the proper time, any delay in taking judicial action, however protracted it may be, does not cause her to lose her right; unless, in the meantime, she has such intercourse with her husband as would presume her consent to the marriage.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 335, 336; Fath-ul-Kadir, Vol. 2, p. 53.

Baillie, Bk. 1, Chap. 4, pp. 51, 52: Hamilton's Hedayah, Vol. 1, Bk. 2, pp. 37, 38; Zaidunil-Ambani, Vol. 1, p. 78.

A minor on attaining puberty may have the marriage contracted during minority cancelled.—*Mulka Jehan v. Mohammed Uskhurree* L. R., I. A., Sup. Vol., 192 (1873). See Sel. Rep., S. A. Bom., 56 (1821).

Art. 50. Where a girl contracted in marriage has the option of having such marriage cancelled on attaining puberty, and she reaches that age after the disappearance of her virginity, then her silence, at the moment her puberty¹ becomes visible, or her silence

Effects of her silence at the time option should be exercised.

¹ See Art. 495.

when informed of her marriage after reaching puberty, if she were ignorant of the fact before that age, does not deprive her of the right to protest, unless she has given formal or tacit consent to the marriage.

It is the same for a boy attaining puberty,¹ and who was contracted in marriage by a guardian other than the father or grandfather.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 13.

Baillie, Bk. 1, Chap. 4, p. 54 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 34 ; Zaidunil-Ambani, Vol. 1, p. 79.

A minor, given in marriage by any person other than the father or grandfather, has the option of ratifying or repudiating it on attaining puberty—*Badal Aurat v. Queen-Empress*, I. L. R. 19 Cal., 79 (1891).

Art. 51. Every male, adult and of sound mind, can marry, even if he is a spendthrift, without the intervention of a guardian.

Every woman at the age of puberty,¹ who is of sound mind, whether a virgin or not, can marry without the intervention of a guardian. The marriage which she herself contracts is valid and binding, so long as the husband she chooses is her equal,² and the dower settled upon her is equal to the proper dower.³

Notes.

Hidaya, Vol. 2, p. 34.

Baillie, Bk. 1, Chap. 4, p. 54 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 34 ; Zaidunil-Ambani, Vol. 1, p. 81.

Freedom to marry on attaining puberty without the intervention of guardian—*Muhammad Ibrahim v. Gulam Ahmed*, 1 Bom. H. C. R., 236, *per* Couch, J. (1864).

¹ See Art. 495.

² See Art. 62.

³ See Art. 78.

Every male or female, adult and of sound mind, can marry without a guardian's intervention.

According to Art. 51, every woman at the age of puberty, who is of sound mind, can marry without the intervention of a guardian, and Art. 53 says that a woman, who has attained puberty, whether virgin or not, cannot be compelled in marriage. She must be consulted and give her consent—Clavel, Vol. 1, p. 35.

See Section 11 of the Indian Contract Act (IX of 1872), and Section 2 of the Indian Majority Act (IX of 1875).

Art. 52. Where a woman, adult and legally competent, herself contracts marriage against the wish of an *Asab*¹ guardian and the dower is inferior to the proper dower,² such guardian can impugn the marriage, in spite of its validity, and demand from the husband payment of the difference existing between the dower settled, and the proper dower, or demand that the marriage should be cancelled by a judge. If the husband were not suitable,³ the marriage would be void *ab initio*, and the subsequent consent of her *Asab* guardian would not render it valid. Where there is no *Asab* guardian, or where such guardian gives his previous and formal consent, an unsuitable marriage contracted by the woman herself is perfectly valid.

Where a woman marries against the wish of an *Asab* relation, the latter can impugn the marriage if husband is not suitable or provides inferior dower.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 321-22.

Baillie, Bk. 1, Chap. 5, p. 67 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 41 ; Zaidu-nil-Ambani Vol. 1, p. 81 ; Clavel, Vol. 1, p. 54.

Art. 53. A woman who has attained puberty, whether virgin or otherwise, cannot be compelled in marriage : she must be consulted and her consent obtained.

Consent of a woman, virgin or otherwise, is essential and how such consent may be expressed.

¹ Agnate.

² See Art. 78 ;

³ See Art. 62.

When a girl, who is a virgin, is consulted before her marriage, or informed of such marriage after its conclusion by a near relation; or his agent,¹ and of her own accord remains silent, after being made aware of the husband to whom she has been united, and of the amount of dower that has been settled on her, or when she smiles or laughs, weeps without sobs, then her silence, smile, laugh, or tears will amount, before conclusion of the marriage, to a ratification.

But where a girl, who is a virgin, is consulted and informed of her marriage by a distant relation, it is indispensable that her consent should be expressed in words or by an act which presumes consent, even when she has been made aware of her future husband, and of the amount of the dower.

Notes.

Fath-ul-Kadir, Vol. 2, p. 44 ; Durrul-Mukhtâr, Vol. 2, p. 5.

Baillie, Bk. 1, Chap. 4, p. 55 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 34 ; Zaidunil-Ambani, Vol. 1, p. 84.

See Sections 13, 14 of the Indian Contract Act (IX of 1872.)

Consent of a woman other than a virgin must be expressed in words.

Art. 54. An adult woman, who is not a virgin, cannot be given in marriage, unless her consent is obtained in words, or by an act which implies her consent : and if consulted by a near or distant relation, she remains silent, her silence does not amount to consent.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 327.

Baillie, Bk. 1, Chap. 4, p. 60 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 35 ; Zaidunil-Ambani, Vol. 1, p. 87.

¹ See Art. 57.

Art. 55. A woman, who has lost her virginity through an accident or old age, is to be treated as a virgin, and so must a wife, separated from her husband by reason of his impotency,¹ or dissolution of marriage by repudiation² or his death, before consummation of the marriage.

Women who are to be treated as virgins.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 5.

Baillie, Bk. 1, Chap. 4, p. 61 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, pp. 35,36 ; Zaidunil-Ambani, Vol. 1, p. 88.

Art. 56. A woman, married too young, must not be taken to her husband's house, before she is physically fit for sexual intercourse. Her father, who cannot be compelled to make her over, has the right of demanding and receiving on her behalf the prompt³ part of the dower. In case of dispute between the husband and the father of the child wife as to her condition, the judge shall appoint either one or two trustworthy matrons to examine her. If the report of the matrons confirms the husband's claim, the wife shall be taken to her husband's house : if the report is to the contrary, she will continue to remain provisionally in her father's house. In such disputes it is the physical constitution and not the age that must be considered.

Girl wife must not be taken to her husband's house before she is physically fit for sexual intercourse, and in case of dispute must be examined by a matron.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 13.

Baillie, Bk. 1, Chap. 4, p. 54 ; Zaidunil-Ambani, Vol. 1, p. 90.

According to Mahomedan law, the effect of the contract of marriage is to place the wife under the dominion of the husband, but notwithstanding marriage, the right to the care and custody of a girl belongs, not to the husband, but to her mother, until she attains the age of puberty—In the matter of *Khatija Bibi*, 5 B. L. R., 557, *per* Norman, J. (1870).

¹ See Art. 298.

² See Art. 217.

³ See Art. 73.

A husband is not entitled to recover a wife of ten years old from the custody of her mother—*Wazir Ali v. Kaim Ali*, 5 N.-W. P., H. C. R., 196 (1873).

See In the Matter of *Mahin Bibi*, 13 B. L. R., 160 (1874); *Nur Kadir v. Zulaikha Bibi*, I. L. R., 11 Cal., 469, per Garth, C. J. (1885); *Korban v. King-Emperor*, I. L. R., 32 Cal., 444 (1904).

CHAPTER V.

AGENCY IN MARRIAGE.

(Arts. 57—61.)

An agent may be appointed to contract marriage.

Art. 57. It is allowable for the contracting parties, when they are adult, and of sound mind, to contract marriage by means of agents.¹

This power is also accorded to the father and other guardians² who can be represented at the marriage of their wards.

Notes.

Bahrr-ul-Rayek, Vol. 3, p. 117; Fatawa-i-Alamgiri, Vol. 2, p. 18.

Baillie, Bk. 1, Chap. 6, p. 83; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 42; Zaidunil-Ambani, Vol. 1, p. 91.

See *Fukhronissa v. Shah Ally Ruzzah*, 6 Sel. Rep., S. D. A., 368 (1840); *Abdul Kadir v. Salima*, I. L. R., 8 All., 149, F. B. (1886); *Badal Aurat v. Empress*, I. L. R., 19 Cal., 79 (1891); *Sabrati v. Jungli*, 2 C. W. N., 245 (1898); *Aklimannessa Bibi v. Mahomed Hatem*, I. L. R., 31 Cal., 849 (1904).

See Section 183 of the Indian Contract Act (IX of 1872).

Art. 58. The appointment of an agent for marriage can be made verbally or in writing, no witness being

Such appointment may be made verbally or in writing.

¹ See Art. 140.

² See Art. 35.

necessary for its validity. Witnesses are only required to avoid disputes on the part of the principal.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 352; Fatawa-i-Alam-giri, Vol. 2, p. 18.

Baillie, Bk. 1, Chap. 6, p. 76; Zaidunil-Ambani, Vol. 1, p. 92.

The authority of an agent may be expressed or implied—See Section 186 of the Indian Contract Act (IX of 1872).

Art. 59. Without the principal's sanction the agent cannot delegate his authority to a third party, unless his powers are absolute.

Agent cannot delegate his power without principal's authority.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 325.

Baillie, Bk. 1, Chap. 6, p. 83; Zaidunil-Ambani, Vol. 1, p. 92.

See Section 190 of the Indian Contract Act (IX of 1872).

Art. 60. Where an agent is authorized by a woman to give her in marriage, he is not bound to make her over to the husband. Nor is he responsible to her for her dower unless he has guaranteed it; in which case he is bound to discharge it, his remedy being against the husband, provided the latter had authorized such guarantee.

Agent is not responsible for delivery of wife to husband nor for dower.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 443.

Baillie, Bk. 1, Chap. 6, p. 75; Zaidunil-Ambani, Vol. 1, p. 93.

Art. 61. The contract entered into by the agent in the name of his principal is only binding on the latter, provided it is made within the scope of his authority. If this authority is exceeded, the contract only becomes binding after ratification¹ by the principal.

Agent's contract, when it is within scope of his authority, binds the principal.

¹ See Arts. 141, 142.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 352, 353.

Zaidu-nil-Ambani, Vol. 1, p. 94.

The bride's father is entitled to set aside the marriage, on the ground of inequality between the parties to the marriage, if it had taken place without his consent—*Mohumdee Begum v. Bairam Khan*, 1 Agra H. C. R., 130, *per* Morgan, C. J. (1866).

As to enforcement and consequences of agent's contracts, see Section 226, as to how far the principal is bound when agent exceeds his authority, see Section 227, and as to the effects of ratification, see Section 196, of the Indian Contract Act (IX of 1872).

CHAPTER VI.**EQUALITY IN MARRIAGE.****(Arts. 62—69.)**

Husband must be the wife's equal, but wife's inferiority does not render marriage invalid.

Art. 62. In order that a marriage may bear the character of a suitable union in law, the husband must be the equal of the woman in accordance with the conditions laid down in the following articles.

The woman's inferiority does not render the marriage invalid. Equality in respect of the husband is a right, which may be claimed by the woman's guardian and by the woman herself. The question must be considered at the time the contract is made; a subsequent change in the husband's condition would not affect the validity of a marriage.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 343, 344, 348, 349.

Baillie, Bk. 1, Chap. 5, p. 62; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 40; Zaidu-nil-Ambani, Vol. 1, p. 94.

Qualifications that constitute equality in marriage.

Art. 63. Where a woman, legally competent, chooses a husband without the previous consent of an *Asab*¹ guardian,² or where a young girl is given in

¹ Agnate

² See Art. 35.

marriage by a relation, other than the father or grandfather, or by one of the latter when he is a reputed profligate, it is necessary for the validity of the marriage, that the contracting parties, if they are of Arab origin, should possess equality of birth; if not of Arab origin, they must possess equality of Islam, fortune, virtue and calling.

Should the husband be inferior to the wife in one of the foregoing conditions, the marriage in the above cases would be invalid.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 344, 345, 346, 347, 348; Fatawa-i-Alamgiri, Vol. 2, p. 18; Bahrr-ul-Rayek, Vol. 3, p. 144.

Baillie, Bk. 1, Chap. 5, p. 66; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 40; Zaidunil-Ambani, Vol. 1, p. 96.

Art. 64. In deciding equality in Islam, it is not necessary, with regard to the husband, to go back further than his father and grandfather.

What constitutes equality in Islam.

Thus he, who has embraced Islam without having been born a Muslim, cannot be the equal of a Muslim woman born of a Muslim father, and he, whose father only is a Muslim, is not the equal of a woman whose father and grandfather were Muslims.

But he, whose father and grandfather are Muslims, is the equal of the woman who has many Muslim ancestors.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 346.

Baillie, Bk. 1, Chap. 5, p. 63; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 40; Zaidunil-Ambani, Vol. 1, p. 98.

Art. 65. Nobility acquired by knowledge and merit is superior to that which is inherited.

Nobility acquired, superior to that which is inherited.

Thus a learned man, who is not of Arab origin, is the equal of an Arab woman, even if she be a *Koreishite*¹.

A learned man who is poor, is the equal of the daughter of the man who is rich and ignorant.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 350.

Baillie, Bk. 1, Chap. 5, p. 63 ; Zaidunil-Ambani, Vol. 1, p. 99.

A man able to pay the prompt part of dower and wife's maintenance, is the equal of a rich woman.

Art. 66. Possession of wealth on the part of the woman is not considered in marriage. The man, who possesses sufficient means to discharge the prompt² portion of the dower, and is able to maintain the wife for one month, or, by his labour provide her daily with the necessary maintenance, is the equal of a rich woman.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 348.

Baillie, Bk. 1, Chap. 5, p. 64 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 40 ; Zaidunil-Ambani, Vol. 1, p. 99.

Equality in respect of virtue or otherwise.

Art. 67. The man, who is a profligate, is not the equal of a virtuous woman, but he is the equal of a woman of immoral character.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 347.

Baillie, Bk. 1, Chap. 5, p. 65 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 40 ; Zaidunil-Ambani, Vol. 1, p. 100.

Equality as regards profession or trade.

Art. 68. With regard to persons not of Arab origin, equality of calling or profession must be taken into consideration as regards Arabs themselves, equality is only to be considered among those who are engaged in trade.

¹ Of the tribe of *Koreish* in Arabia, to which the Prophet Mahomet belonged.

² See Art. 73.

If the trade followed by the husband is nearly on a footing with that followed by the father-in-law, the slight difference would not constitute a misalliance; but if the trades differ greatly, he, who exercises a low calling, cannot be the equal of a woman whose father follows a higher calling.

In this connection the custom of each country must serve as a guide, according as the trades there are considered more or less reputable.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 348.

Baillie, Bk. 1, Chap. 5, p. 66; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 41; Zaidunil-Ambani, Vol. 1, p. 100.

Art. 69. Where a guardian has contracted a woman in marriage by her own consent, and is ignorant of the husband's condition in life, neither the guardian nor the woman can have the marriage cancelled, if it is discovered subsequently that the husband was not the wife's equal.

Ignorance of the husband's condition in life at the time of marriage, does not affect its validity, except in the case of misrepresentation.

But where the guardian has stipulated that the husband should be the wife's equal, and the husband, representing himself as such, turns out to be manifestly inferior to the wife, the guardian may either ratify the marriage or have it dissolved.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 344.

Baillie, Bk. 1, Chap. 5, pp. 70, 71; Zaidunil-Ambani, Vol. 1, p. 102.

See Section 19 of the Indian Contract Act (IX of 1872).

CHAPTER VII.

DOWER.

(Arts. 70—119.)

SECTION I.—AMOUNT OF DOWER, AND THE FIT SUBJECTS OF WHICH DOWER MAY CONSIST.

(Arts. 70-73.)

Minimum
dower.

Art. 70. The lowest amount of dower is fixed at ten *dirhems*¹ or pieces of silver weighing seven *miskals*, coined or uncoined. There is no limit to dower, and the husband may settle upon the wife a dower more or less considerable in accordance with his means.

Notes.

Hidaya, Vol. 2, p. 305 ; Radd-ul-Muhtâr, Vol. 2, pp. 356, 357, 358.

Baillie, Bk. 1, Chap. 7, pp. 92, 93 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 44 ; Zaidunil-Ambani, Vol. 1, p. 103 ; Clavel, Vol. 1, p. 51.

See Sale's Koran, Chap. XXXIII, p. 348.

There is nothing in the Mahomedan law to limit the amount fixable for dower—*Mulleeka v. Jumeela*, 11 B. L. R., 375, P. C. (1872).

By the Sunni doctrines of Hanifa, the extent of dower is not limited ; the parties may extend it by agreement to what amount they please ; ten *dirhems* is the lowest rate. Among the Shiahs, the lowest or highest rate is not fixed ; anything possessing a legal value, may lawfully be given as dower, but the proper dower is five hundred *dirhems*.—*Oomduton-Nissa Begum v. Asud Ali*, 1 Sel. Rep., S. D. A., 369 (1809).

¹ Six Shillings and eight pence sterling.

Agreeably to the doctrines of the Shiah and the Sunni sects, it is optional with the parties contracting the marriage to fix the amount either before or after the reading of the marriage ceremony—*Rahut-Oo-nissa v. The heirs of Mirza Hizubr Beg*, 2 Sel. Rep., S. D. A., 254 (1816).

Where the amount of dower stipulated was excessive with reference to the means of the husband, under the Oudh Laws Act, 1876, a reasonable amount was allowed to the wife, having regard to her status in life—*Suleman Kadr v. Mehdi Begum Surreya*, L. R., 20 I. A., 144 ; 1. L. R., 21 Cal., 135, P. C. (1893).

Dower is often high among Mahomedans, to prevent the husband repudiating his wife, in which case he would have to pay the amount stipulated—*Zakeri Begum v. Sakina Begum*, L. R., 19 I. A., 157 ; 1. L. R., 19 Cal., 689, P. C. (1892).

The Courts in the N.-W. Provinces have not been vested by the Legislature with the discretion which has been conferred on the Courts in Oudh, by section 5 of Act XVIII of 1876, to award to a Mahomedan lady only so much of the stipulated amount of dower, as the Court may consider reasonable with reference to the means of the husband and the status of the wife—*The Collector of Moradabad v. Harbans Singh*, I. L. R., 21 All., 17 (1898).

Proof of verbal contract for a large amount of dower is allowable—*Shah Najumooddeen Ahmed v. Beebee Hosseinee*, 4 W. R., 110 (1865) ; *Abdul Karim v. Fazilat-un-Nissa*, 5 Sel. Rep., S. D. A., 90 (1830).

See *Tajoo Bebee v. Noorun Bebee*, 1 W. R., 31 (1864) ; *Abdul Kadir v. Salima*, I. L. R., 8 All., 149 (1886).

Art. 71. Dower may consist of movable and immovable property, jewels, animals, things which may be replaced by things of like nature, and even the usufruct of movable or immovable property.

Of what
dower may
consist.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 357.

Baillie, Bk. 1, Chap. 7., p. 93 ; Zaidunil-Ambani, Vol. 1, p. 105.

Where a deed of settlement covered certain property which was not in the possession of the settlor, held that the settlement was invalid—*Noor Buksh Chowdree v. Mahomed Arif Chowdree*, 7 Sel. Rep., S. D. A., 142 (1843).

Where property given to wife in her dower contained no specification, held that the Kabinnamah did not convey such property—*Kadirdad Khan v. Nooroon Nissa*, 7 Sel. Rep., S. D. A., 185 (1844) ; See also *Shaik Futteh Ali v. Jarwa*, 6 Sel. Rep., S. D. A., 216 (1837).

Property non-existent cannot be made subject of dower—*Oojudhea Beebee v. Mohun Bebee*, 6 Sel. Rep., S. D. A., 34 (1835).

Where the husband had previously settled the whole of his property upon a wife in lieu of dower, he cannot, without the latter's permission, make over any portion of the same to another wife—*Banno Beebee v. Fukherooddeen Hosein*, 2 Sel. Rep., S. D. A., 230 (1816).

See *Suffuronisa v. Ayesha Bibi*, 6 Sel. Rep., S. D. A., 215 (1837) ; *Muhammed Noor Buksh v. Budun Chund Bibee*, Dec. S. D. A., 885 (1852).

Art. 72. Those things which have no value in themselves or cannot be lawfully possessed by Muslims, cannot validly be settled as dower.

If unlawful things are settled as dower, the settlement is void, but the contract none the less remains valid.¹

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 23.

Zaidu-nil-Ambani, Vol. 1, p. 106.

Art. 73. The dower may be paid in full at the time of the marriage contract or subsequently, or it can be divided into two parts, one prompt and the other deferred, according to the custom of the locality.

Unlawful things cannot be settled as dower.

Prompt and deferred dower.

¹ See Art. 91.

Notes.

Fatawa-i-Alamgiri, Vol. 2, pp. 32, 33.

Macn. Prin., Chap. 7, s. 22, p. 59 ; Baillie, Bk. 1, Chap. 7, p. 92 ; Zaidunil-Ambani, Vol. 1, p. 106 ; Clavel, Vol. 1, p. 64.

Unless the payment of the whole or part of the dower is expressly postponed, it is payable on demand—*Masthan Saheb v. Assan Bivi Ammal*, I. L. R., 23 Mad., 371 (1900).

No claim would lie for the dower not exigible, until the death of the husband, or the dissolution of the marriage by repudiation—*Noorunnissa Begum v. Nawab Syed Moshin Ali Khan*, 7 Sel. Rep., S. D. A., 46 (1841).

When nothing has been said as to the character of dower, the Court may determine the amount to be considered prompt, with reference to the position of the woman and the amount of the dower named in the contract, taking into consideration at the same time what is customary. The reference to custom appears to be in respect of the portion to be held as prompt, and it does not appear to have been contemplated to refer to custom to decide, whether or not the entire dower should be deferred—*Taufikunnissa v. Ghulam Kambar*, I. L. R., 1 All., 506 (1877).

An inquiry into custom with the view of determining the portion of the dower debt payable promptly is proper ; and when the question can not be decided by reference to custom, it is proper to determine it with reference to the status of the woman and the amount of the fixed dower—*Eidan v. Mazhar Husain*, I. L. R., 1 All., 483 (1877).

The admitted rule seems to be that laid down in Macnaghten's Principles, Chapter 7, section 22, to the effect that when it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand—*Bedar Bukht v. Khurram Bukht*, 19 W. R., 315, P. C. (1873).

Where no specific amount of dower has been declared exigible, one-third only of the whole should be considered exigible during the life of the husband, the remaining two-thirds being claimable on the death of the husband—*Fatma Bibi v. Sadruddin*, 2 Bom. H. C. R., 291 (1865).

See *Mereamoonissa Begum v. Imdadee Begum*, 3 S. D. A., N. W. P., 185 (1848). *Shumsoonnissa v. Noor Beebee*, S. D. A., N. W. P., 33 (1854).

According to Mahomedan law and the current of decisions deferred dower can be demanded only when the marriage is dissolved either by repudiation or by the death of the husband—*Khajarannissa v. Risannissa Begum*, 13 W. R. 371 ; 5 B. L. R., 84 (1870) ; See *Hosseinooddeen Chowdree v. Tajunnissa Khatoon*, W. R. Sup. Vol., 199 (1864). *Ranee Khajooroonissa v. Mirza Saifoolla Khan*, 15 B. L. R., 306, P. C. (1875).

In the absence of express contract, dower is presumed to be prompt—*Tadiya v. Hasenebiyari*, 6 Mad. H. C. R., 9 (1870).

Where a husband charged his whole estate with the amount of dower, and his widow, on his death, took possession of his estate in satisfaction of her claim, she was held to have a lien on her husband's estate in lieu of dower—*Ameer-oon-Nissa v. Moorad-oon-Nissa*, 6 M. I. A., 211 (1855) ; See *Soorma Khatoon v. Attafoonnissha Khatoon*, 2, Hay 210 (1863) ; *Ahmed Hossein v. Khadija*, 3 B. L. R., A. C., 28 (1868).

A Mahomedan widow, is entitled to a lien for whatever dower remains due to her, although there may be a dispute as to what is the amount actually due, having reference either to the amount originally fixed as dower or to the amount satisfied by payments—*Ahmed Hossein v. Mussamat Khodeja*, 10 W. R., 368 (1868), and she has a prior claim on account of her dower on the property left by her husband, whether real or personal—*Syed Atahur Ali v. Altaf Fatima*, 10 W. R., 370, *per* Peacock, C. J. (1863).

Where a Mahomedan widow obtained actual and lawful possession of her husband's estates under a claim to hold them as heir for her dower, held that she was entitled to retain possession until her dower was satisfied—*Bebee Bachun v. Sheikh Hamid Hossein*, 14 M. I. A., 377 (1871) ; *Bakreedan v. Ummatul Fatma*, 3 Cal. L. J., 541 (1905).

Under Article 103 of the Schedule II of the Indian Limitation Act (XV of 1877), a Mahomedan is entitled to bring a suit for exigible or prompt dower within three years from the time when the dower is demanded and refused, or where during the continuance of the marriage no such demand has been made, then when the marriage is dissolved by death or repudiation.

See *Begoo Jann v. Gashee Bebee*, 6 W. R., 19, c. r. (1866) ; *Mulleeka v. Jumeela*, 11 B. L. R., 375, P. C. (1872) ; *Mahaba Bibi v. Amnia*, 10 Bom. H. C. R., 430 (1873) ; *Ranee Khajooroonissa v.*

Mirza Saifoola Khan, 15 B. L. R., 306, P. C. ; 24 W. R. 163, P. C. (1875).

The period of limitation for a suit for deferred dower is prescribed by Article 104 of the Schedule II of the Indian Limitation Act (XV of 1877), and a suit must be brought within three years from the time the marriage is dissolved by death or repudiation.

See *Ameer-oon-Nissa v. Moorad-oon-Nissa*, 6 M. I. A., 211 (1855); *Janee Khanum v. Amatool Fatima*, 8 W. R., 51 (1867); *Mahar Ali v. Amani*, 2 B. L. R., A. C., 306; *Abbasi Begam v. Nanhi Begam*, I. L. R., 18 All., 206 (1896).

SECTION II.—THE WIFE'S RIGHT OVER THE DOWER.

(Arts. 74—80).

Art. 74. The wife acquires a legal right over her whole dower as soon as the marriage is validly contracted, whether the husband or his guardian settled the amount in the contract, whether no amount was agreed upon, or whether there was a stipulation that no dower at all should be paid.

Wife's right to dower is acquired as soon as marriage is validly contracted.

Notes.

Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 44; Zaidunil-Ambani, Vol. 1, p. 107; Clavel, Vol. 1, p. 55.

A wife's claim for the full amount of dower discussed—*Sahib Jan Khatoon v. Dianut Beebee*, 3 Sel. Rep., S. D. A., 16 (1820).

According to Mahomedan law, the simple contract of money payment in lieu of dower does not necessarily give the wife a lien over her husband's property. It is possible, no doubt, in any given case, that the terms of the contract may be such as to give her the security of specified property for the payment of the money—*Mehran v. Kubiran*, 6 B. L. R., 60, *per* Phear, J. (1870).

A widow, in possession of her husband's estate and holding over until payment of her dower against the heirs, was entitled to hold over until her dower was paid—*Wahidunnissa v. Shubrat-tun*, 6 B. L. R., 54; 14 W. R., 239 (1870); *Woomatool Fatima v. Meerunmununnissa*, 9 W. R., 318 (1868).

When a Mahomedan widow, was, by a decree of the court, put into possession of the property of her husband, in order to obtain by that possession payment of her dower ; and she during her lifetime, and after her death, her heir, had continued in possession of the property ever since that time, held that her husband's heir was entitled to an account of the mesne profits received by her in satisfaction of the dower—*Mahomed Amee-noodeen Khan v. Moozuffar Hossein*, 5 B. L. R., 570 ; 14 W. R., 5, P. C. (1870).

See *Azizullah Khan v. Ahmed Ali Khan*, I. L. R., 7 All., 353 (1885) ; *Amanat-un-Nissa v. Bashir-un-Nissa*, I. L. R., 17 All. (1894) ; *Karimullah v. Amani Begam*, I. L. R., 17 All., 93 (1895).

Where a Mahomedan husband made a gift of immovable property in lieu of the whole dower in favour of his wife, such gift was held valid according to Mahomedan law—*Sahiba Begum v. Atchamma*, 4 Mad. H. C. R., 115 (1868).

Where a Mahomedan widow has a valid claim for dower against the estate of her late husband, she cannot, as against the legal heirs, take possession of the same, but must bring a regular suit—*Bibee Selamut v. Mowla Buksh*, 5 W. R., 194 (1866) ; *Kareem Buksh v. Doolhin Khoord*, 15 W. R., 82 (1877).

It is settled by several decisions that the Mahomedan widow's right to dower against the estate of her deceased husband is, generally speaking, simply in the situation of a debt which one, like any other creditor, can take legal measures to enforce against such property of her husband as one can find in the hands of the heirs or in the hands of any other persons, provided these have taken as volunteers or with notice of her making a specific claim against that property—*Begum v. Doolee Chund*, 20 W. R., 92, *per* Phear, J. (1873).

A lien for dower which a Mahomedan widow may obtain on lands of her husband is a purely personal right and does not survive to her heirs—*Hadi Ali v. Akbar Ali*, I. L. R., 20 All., 262 (1898).

A Mahomedan widow is entitled to purchase property as her own with money given to her by her husband on account of dower—*Nasoo v. Mahatal Beebee*, 4 W. R., 7 (1865).

The right of a Mahomedan widow to dower is personal to herself and does not pass to a purchaser of the estate. For

dower stands upon no higher or better footing than any other debt due from her deceased husband ; and, except where there is a distinct agreement to that effect, there is no presumption of hypothecation of his estate for her dower to be drawn from the mere circumstance that dower is due—*Ali Mahomed Khan v. Azizullah Khan*, 1. L. R., 6 All., 50, *per* Straight, C. J. (1883).

Where a widow's claim for unpaid dower constitutes a debt payable *pari passu* with the demands of other creditors—*Humeada v. Budlun*, 17 W. R., 525, P. C. (1872).

Widow's possession in lieu of dower—*Ali Buksh v. Kareem Beebee*, 1 Sel. Rep., S. D. A., 110 (1803) ; *Nuseeboonissa v. Syed Danush Ali*, 3 W.R., 133 (1865) ; *Kummur-ool-Nissa v. Mohamed Hussun*, 1 Agra H. C. R., 287 (1866) ; *Mohamed Ussud-oollah v. Ghasheea Beebee*, 1 Agra H. C. R., 151 (1866) ; *Bunday Ali v. Chotee Bebee*, 1 Agra H. C. R., 273 (1866) ; *Azeeman v. Asghar Ali*, 2 Agra H. C. R., 167 (1867) ; *Ghufoorun Bebee v. Khwajeh Mustukedeh*, 2 Agra H. C. R., 300 (1867) ; *Meeran v. Najeebun*, 2 Agra H. C. R., 335 (1867) ; *Dhun Sing v. Ram Sahai*, 2 Agra H. C. R., 39 (1867) ; *Sayad Umed Ali v. Saffihan*, 3 B. L. R., 175 (1869) ; *Khyratun v. Amanee*, 11 W. R., 212 (1869) ; *Mehran v. Kubeeran*, 13 W. R., 49 (1870) ; *Baland Khan v. Janee*, 3 N.-W. P., 319 (1870) ; *Bibee Tajim v. Syud Wahed Ali*, 22 W. R., 118 (1874).

According to Mahomedan law marriage presents cannot be counted in lieu of dower without the wife's consent—*Sheikh Uzeez Oolla v. Ghufloor Beebee*, 2 Borr. Bom. S. D. A., 284 (1822).

A Mahomedan widow cannot take possession of the real estate of her husband in lieu of dower without the consent of the heirs—*Wuzeerun v. Mahomed Hossain*, 5 Sel. Rep., S. D. A., 40 (1841).

Nor can a Mahomedan widow, in possession in lieu of dower, sell any portion of the property. She cannot give a good title to any portion of the property, inasmuch as her position is only that of a widow in possession in lieu of her dower—*Chuhi v. Shams-un-nisa Bibi*, 1. L. R., 17 All., 19, *per* Edge, C. J. (1894).

According to the Punjab Code of 1854, the Court was entitled to properly exercise its discretion in making an equitable division of the estate of a deceased Mahomedan between the widow and heirs and to award the widow a fair sum of the dower—*Mulkah Do Alum v. Jehan Kudr*, 10 M. I. A., 252 (1865).

A Mahomedan widow's claim for dower is not a lien on her husband's property such as is obtained by a mortgage. The Mahomedan law has nowhere placed a claim for dower as high as a mortgage, but has ranked it on a par with ordinary debts—*Ameer Ammal v. Sankaranarayanan Chetty*, I. L. R., 25 Mad., 658 (1901).

Husband
bound to
pay the full
amount of
dower sti-
pulated.

Art. 75. If the amount of the dower is specified in the contract at ten *dirhems*, or at a lower value than this amount, the husband is bound to pay the full ten *dirhems*.

Should the husband settle in the contract a dower larger than the minimum, he is obliged to discharge it, however large it may be.

Notes.

Radd-ul-Muhtâr Vol. 2, p. 356.

Baillie, Bk. 1, Chap. 7, p. 93; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 44; Zaidu-nil-Ambani, Vol., 1, p. 108; Clavel, Vol. 1, p. 51.

A Mahomedan widow was entitled to the whole of the dower which her late husband agreed to give her, and which was fixed not in reference to his means at the time of marriage, but to the value she possessed in the matrimonial market, that value being mainly determined by the local position and traditions, the surroundings and antecedents of her family—*Sugra Bibi v. Masuma Bibi*, I. L. R., 2 All., 573, F. B. (1877).

An excess of dower, though improper, is not prohibited by Mahomedan law. The amount of the dower is recoverable from the real and personal property left by the husband, in preference to the claims of heirs—*Wujih-oon-Nisa Khanum v. Husun Ali*, 1 Sei. Rep., S. D. A., 356, (1808.)

See *Zakeri Begum v. Sakina Begum*, I. L. R., 19 Cal., 689, P. C.; L. R., 19 I. A., 157 (1892.)

See Notes to Art. 70; The Oudh Laws Act (XVIII of 1876), s. 5.

Art. 76. Where a marriage takes place without the amount of dower being settled in the contract, the wife is entitled to the proper dower.

Cases in which wife is entitled to proper dower.

The same rule applies in the following cases :—

(1). When the husband or his guardian has settled as dower, unlawful things, or objects or animals, without specifying their particular kind or quality.

(2). When the husband has stipulated that no dower should be paid.

(3). When the marriage is contracted by exchange.²

(4). When the husband in lieu of dower undertakes to teach his wife the *Koran*.

Notes.

Durrul-Mukhtâr, Vol. 7, pp. 1, 8, 9.

Zaidu-nil-Ambani, Vol. 1, p. 108.

The Mahomedan dower being the consideration paid by the bridegroom for the marriage, it is regulated by the position and dignity of the bride, especially since Mahomedan men often contract most unequal marriages. A customary or proper dower is made out by showing a custom of the women of the woman's family to receive, rather than of the men of the husband's family to pay, a certain dower—*Shah Nujumooddeen Ahmed v. Beebee Hosseinee*, 4 W. R., 110 (1865).

See *Tauñik-un-nissa v. Ghulam Kambar* I. L. R., 1 All., 506 (1877).

Art. 77. The proper dower of a woman, is determined by the amount of dower, which has been paid to a woman who is her equal and belongs to her father's family. The dower which has been given to her full-sister or half-sister by the father, to her paternal

How the wife's proper dower is to be determined.

¹ See Art. 72.
AR, IML

² See Art. 15.

aunt, or to the daughters of her paternal uncle, may be taken as a means of comparison, but not the dower settled upon her mother or maternal aunt, if they do not belong to the same family as her father.

On making the comparison, due regard must be paid to the woman's age at the time of the marriage contract, her beauty, the fortune she possesses, the country in which she lives, the intelligence with which she is endowed, the times in which she lives, her piety, her virtue, the fact of her being a virgin or not, her training and education, taking into account also the fact of her having borne a child or not, and the condition of her husband.

If in her father's family a woman excels the others, in respect of all or some of these qualities, a woman of some family equal to that of the father, may be taken for comparison.

The declaration of two irreproachable male witnesses, or that of one male and two female witnesses, of recognised integrity, is necessary for determination of the proper dower.

In default of irreproachable witnesses or of women fulfilling the necessary conditions, the sworn declaration of the husband may be received.

Notes.

Durrul-Mukhtâr, Vol. 2, pp. 10-11.

Baillie, Bk. 1, Chap. 7, pp. 93,94 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, pp. 45, 47, 51 ; Zaidunil-Ambani, Vol. 1, p. 110 ; Clavel, Vol. 1, p. 49.

Woman
married
without
dower is
entitled to
proper
dower.

Art. 78. If no dower has been settled, the woman is entitled, after solemnization of marriage, to insist upon her husband fixing the dower before consummation of the marriage.

In case of refusal, the judge, on the wife's requisition and after a summons to the husband, shall decree the amount of dower taking the proper dower as a basis, in accordance with the procedure laid down in the foregoing Article.

The husband becomes responsible for the dower, fixed after marriage by mutual agreement or by judicial decree.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 358, 365.

Baillie, Bk. 1, Chap. 7, p. 95 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, pp. 53, 54 ; Zaidunil-Ambani, Vol. 1, p. 112 ; Clavel, Vol. 1, p. 53.

Where there was no deed of dower, it was held that the widow was entitled to her proper dower having regard to her rank and circumstances of her family—*Uzeez-oo-Nisa v. Culub Ali*, 3 Sel. Rep., S. D. A., 428, (1824).

In order to support a claim for dower, very satisfactory evidence was absolutely indispensable—*Huseena v. Husmutoonissa*, 7 W. R., 495 (1867).

Art. 79. After solemnization of the marriage the husband, as also his father or paternal grandfather, may make additions to the stipulated dower, and the husband shall be bound to discharge such additions, provided that the wife or her guardian is aware of the amount of such additions and accepts them before dissolution of the marriage.

Husband, father, or paternal grandfather may make additions to the dower.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 365.

Baillie Bk. 1, Chap. 7, p. 111 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 45 ; Zaidunil-Ambani, Vol. 1, p. 113.

See Sale's Koran, Chap. IV, p. 63.

Adult wife can remit dower in her husband's favour, but father cannot do so in respect of his minor daughter.

Art. 80. An adult wife of sound mind, may voluntarily remit in her husband's favour, the whole or part of the stipulated dower.

In no case can a father remit a part of the dower settled on his minor daughter, nor can he do so in the case of his adult daughter without obtaining her formal consent.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 366.

Baillie, Bk. 1, Chap. 7, pp. 112, 119, 121 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 45 ; Zaidunil Ambani, Vol. 1, p. 114 ; Clavel, Vol. 1, p. 67.

A Mahomedan wife can remit her claim to dower—*Ahmud Ollah v. Fueza Beebee*, 1 Sel. Rep., S. D. A., 381 (1809) ; *Beebee Munwan v. Nusrut Ali*, 1 Sel. Rep., S. D. A., 86 (1803).

Where a Mahomedan widow assented to a person, taking a legacy, under her husband's will, without putting forward her claim to dower, held, that such assent operated as a waiver of her claim—*Rezsa Hossein v. Ifatoonnissa*, 2 Hay's Rep., 564 (1863).

SECTION III.—CIRCUMSTANCES PERFECTING THE WIFE'S RIGHT TO THE FULL DOWER, AND THOSE CAUSING HER TO FORFEIT THE HALF OR THE WHOLE OF THE DOWER.

(Arts. 81—90.)

Where full dower is due and payable.

Art. 81. The full amount of stipulated dower becomes due and payable in the following three cases :—

1. On the consummation of marriage, consequent upon a valid or invalid marriage or a semblance of right.
2. On the valid retirement, consequent upon a valid marriage.
3. On the death of either husband or wife, even before consummation of the marriage.

In a valid marriage the wife is entitled to any additions made to the dower. In a marriage invalid

by reason of cohabitation by mistake, or where no dower at all is fixed, or where the wife leaves its fixation to the husband, or where the husband has settled unlawful objects by way of dower, the wife is entitled to her full proper dower.

After the wife's right over the whole dower has been perfected by one of the above specified circumstances, she does not forfeit such right even when she herself is the cause of the dissolution of the marriage, unless she renounces her claim in favour of her husband.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 358, 365, 379.

Baillie, Bk. 1, Chap. 7, pp. 96, 101 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 81 ; Zaidu-nil-Ambani, Vol. 1, p. 116.

Art. 82. The valid retirement which constitutes a legal presumption of the consummation of marriage, and perfects the wife's right over the whole dower, is that in which the husband and wife are alone together in a secluded place, in which nobody can overlook them without their knowledge, and where the husband is free to have connection with his wife without let or hindrance.

What constitutes valid retirement.

Notes.

Sharh-i-Vikaya, Vol. 2, p. 36.

Baillie, Bk. 1, Chap. 7, pp. 98—100 ; Zaidu-nil-Ambani, Vol. 1, p. 119 ; Clavel, Vol. 1, p. 55.

Art. 83. Where a marriage is valid, a valid retirement is equivalent to consummation, and produces the same effect, in that it renders payment of the dower in full binding upon the husband even though he is

Legal effect of valid retirement.

impotent. It is sufficient to establish the legitimacy of the children born to the wife with whom the retirement took place, and it obliges the husband to maintain her, and provide her with the necessary clothing and lodging. It also entails the prohibition to marry her sister or four other women while she is observing *Iddat*.¹

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 69, 70, 366, 370, 371.

Baillie, Bk. 1, Chap. 7, p. 101 ; Zaidunil-Ambani, Vol. 1, p. 121.

Where a wife, repudiated before consummation, is entitled to half of the dower and any increase to the dower.

Art. 84. When, after a valid marriage, a wife is repudiated² before actual or presumed consummation, she is only entitled to one half of the stipulated dower. Unless the wife has received the dower, the second half goes back to the husband without the wife's consent, or the need of a judicial decree, and the wife is entitled to only one half of any increase in the original dower, whether such increase occurred before or after repudiation.

Where the wife has received the whole dower, she must restore one half of it, but this half does not become the husband's property until the wife has consented, or there has been a judicial decree, nor can the husband validly dispose of it before such consent or decree ; the wife, on the other hand, can dispose of the dower by any lawful means.

If there are increases in the dower, whether before or after repudiation, but before the decree, they belong exclusively to the wife, and she is only bound to restore one half of the original dower, having regard to the time at which it was paid to her.

The wife repudiated before actual or presumed consummation of marriage, is not entitled to any additions

¹ See Art. 310.

² See Art. 217.

to the dower made by a subsequent act, not even the half.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 359, 360, 365, 366.

Baillie, Bk. 1, Chap. 7, p. 96 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 44 ; Zaidunil-Ambani, Vol. 1, p. 123.

See Sale's Koran, Chap. II, p. 28.

When consummation of marriage cannot be presumed, only half the dower is claimable of the husband—*Abdul Karim v. Fazelat-un-nissa*, 5 Sel. Rep., S.D.A., 92 (1830).

Art. 85. In the case referred to in the preceding Article, the wife would only be entitled to the stipulated dower, provided the marriage is dissolved by repudiation before consummation, and where the husband is in fault as in the case where he makes an imprecation,¹ or where the marriage is cancelled by reason of his impotency,² apostasy,³ or refusal to embrace Islam⁴ after the wife has been converted to that faith.

Where she is entitled to stipulated dower.

But if the marriage is dissolved before its consummation by the fault of the wife as would be the case where she abjures Islam, or, being neither a Christian nor a Jewess, refuses to embrace Islam after her husband has done so, she loses all right to the second half of the stipulated dower, and if this second half has been paid to her, she is bound to restore it.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 364 ; Fath-ul-Kadir, Vol. 2, p. 80.

Baillie, Bk. 1, Chap. 7, p. 96 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 45 ; Zaidunil-Ambani, Vol. 1, p. 128.

¹ Liân, See Art. 335.

² See Art. 298.

³ See Art. 303.

⁴ See Art. 126.

Where wife
in lieu of
dower is
entitled to
Mutah or
present.

Art. 86. When repudiation, precedes actual or presumed consummation, the wife married without any fixed dower is entitled neither to half of the proper dower, nor to the half of any dower settled upon her after marriage.

Thus, when no dower has been settled by the husband, or when unlawful objects have been settled as dower,¹ and the wife consequently becomes entitled to her proper dower,² or when the dower has been settled after the marriage contract, in all these cases, the husband, when he repudiates his wife before actual or presumed consummation of marriage, is liable for nothing beyond *Mutah*³ or the present consisting of clothes. Moreover if the dissolution of marriage is brought about by her own fault, the wife loses her right even to *Mutah*.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 363.

Baillie, Bk. 1, Chap. 7, p. 96 ; Zaidunil-Abmani, Vol. 1, p. 131.

See Sale's Koran, Chap. II, p. 28.

Where valid
retirement
does not
amount to
consumma-
tion of
marriage.

Art. 87. Where the marriage is void and is dissolved before consummation, a valid retirement would not be equivalent to consummation, nor entitle the wife to half the dower.

Thus, in the event of judicial or voluntary separation of the married parties before actual consummation, the wife can claim no part of the dower even if there has been a valid retirement.⁴

Where a marriage is cancelled after consummation, the wife is entitled to whichever is the lower of the stipulated or proper dower, and in default of any

¹ See Art. 72.

² See Art. 77.

³ See Art. 90.

⁴ See Art. 82.

stipulated dower, to the proper dower, however large it may be.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 379, 380, 382 ;
Fatawa-i-Alamgiri, Vol. 2, p. 40.

Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 52 ; Zaidunil-Ambani, Vol. 1, p. 132 ; Clavel, Vol. 1, p. 55.

Art. 88. When a minor marries without the consent of his guardian, and the latter disapproves of and cancels the marriage, the wife is entitled to neither dower nor *Mutah*.

Where guardian cancels a minor's marriage, the wife is not entitled to dower.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 400.

Zaidunil-Ambani, Vol. 1, p. 133.

Where a minor was married in the absence of the guardian and the dower was fixed without the latter's consent, and on the minor attaining majority, he did not acknowledge the amount, held that the wife was not entitled to the amount of dower so fixed—*Kureemoonissa v. Ruheem Ali*, 2 Sel. Rep., S. D. A., 299 (1817).

Art. 89. When a woman is married by her guardian, other than her father or grandfather, to a husband who is her equal¹ and who provides dower equivalent to her proper dower,² and on attaining puberty she protests against the contract before actual or presumed consummation, and demands annulment of the marriage, she also loses her right to dower or *Mutah*.

Other cases where a wife loses her right to dower or *Mutah*.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 330, 331 ; Bahrr-ul-Rayek, Vol. 3, pp. 130-158.

Zaidunil-Ambani, Vol. 1, p. 128 ; Clavel, Vol. 1, pp. 60, 119.

¹ See Art. 62.

² See Art. 77.

Of what
Mutah con-
sists and
how payable.

Art. 90. *Mutah*, or the present consisting of clothes which is given to the wife, who is repudiated and not entitled to half the dower, must be fixed according to local custom, due regard being paid to the clothes that women generally wear when going out, and to the respective conditions of husband and wife.

Mutah can be paid in money, the value in no case to exceed half the proper dower, however rich the husband may be, nor to fall below five *dirhems* if the husband is poor.

The wife who has a stipulated dower and is repudiated¹ before the marriage is consummated, and the woman who becomes a widow, are not entitled to *Mutah*. As regards the wife repudiated after consummation of the marriage, it is praiseworthy not to deprive her of *Mutah*, even when she has a stipulated dower.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 364, 365.

Baillie, Bk. 1, Chap. 7, pp. 97, 98 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 45 ; Zaidu-nil-Ambani, Vol. 1, p. 133.

SECTION IV.—CONDITIONS IN THE SETTLEMENT OF DOWER

(Arts. 91—94.)

Husband is
bound to
carry out
conditions
in the
dower.

Art. 91. The husband who settles upon his wife a dower less than the proper dower, at the same time undertaking to procure for her an equivalent compensation by way of meeting the difference, needs only pay the dower agreed upon provided he fulfils his undertaking.

In case of non-performance, he must pay the proper dower², so long as the use of the objects promised is

¹ See Art. 86.

² See Art. 77.

lawful¹. But if their use is unlawful, the husband's undertaking becomes void, and he is only liable for the dower agreed upon, without being bound to pay the difference between that and the proper dower.²

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 374.

Baillie, Bk. 1, Chap. 7, p. 104 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 49 ; Zaidunil-Ambani, Vol. 1, p. 135.

Art. 92. Where a man marries a woman, and upon the condition that she is a virgin provides a dower higher than the proper dower,² he is only bound to pay the proper dower, if it is proved that she does not comply with the condition of virginity.

Payment of dower where wife's virginity is stipulated for.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 375.

Baillie, Bk. 1, Chap. 7, p. 104 ; Zaidunil-Ambani, Vol. 1, p. 137.

Art. 93. Where a husband settles upon a woman two different amounts of dower, undertaking to pay the higher amount on condition that she possesses certain physical qualities, and the lower amount in the event of her not possessing the same, he is bound to pay the higher or lower amount in accordance with the manner in which she fulfils the required conditions.

Where beauty is stipulated for.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 375.

Baillie, Bk. 1, Chap. 7, p. 104 ; Zaidunil-Ambani, Vol. 1, p. 138.

¹ See Art. 72.

² See Art. 77.

Where husband is bound to pay stipulated or proper dower.

Art. 94. Where a man makes virginity a condition of his union with a woman, and finds that she is not a virgin, he is none the less bound to pay the whole dower stipulated in the contract, and where there is no dower stipulated, he must pay the full proper dower¹ which cannot be reduced by reason of the absence of virginity.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 362, 363.

Baillie, Bk. 1, Chap. 7, p. 104; Zaidunil-Ambani, Vol. 1, p. 137.

SECTION V. PAYMENT OF DOWER. THE WIFE'S RIGHT OVER THE DOWER.

(Arts. 95—99.)

Persons who may receive dower for or on behalf of a minor.

Art. 95. The father, grandfather, executor or judge may receive payment of the dower on behalf of a minor, virgin or otherwise placed under their guardianship and may give a valid receipt in respect of the same. Such receipt releases the husband from liability, the wife on attaining puberty having no claim against him.

The adult wife herself takes possession of her dower; if she is not a virgin, no guardian can realise it for her without her express authority; nor can he receive it in the case where she is a virgin and forbids its payment. If, however, the adult virgin does not forbid it, the guardian may validly receive the dower on her behalf.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 400.

Baillie, Bk. 1, Chap. 7, p. 129; Zaidunil-Ambani, Vol. 1, p. 139; Clavel, Vol. 1, pp. 66, 67.

Executors have power to realise dower.

Art. 96. No other guardians, including the mother except in their capacity of executors, have a right to receive payment of dower on behalf of a minor. Thus

¹ See Art. 78.

when the mother is executrix and as such receives the dower of her minor daughter, the latter on attaining puberty must sue her mother, and not her husband; but if the mother, not being an executrix, receives payment of the dower, her daughter on attaining puberty, must proceed against the husband, whose remedy would be against the mother.

This rule applies to guardians other than those mentioned in the preceding Article.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 400.

Baillie, Bk. 1, Chap. 7, p. 129; Zaidunil-Ambani, Vol. 1, p. 140; Clavel, Vol. 1, pp. 66, 67.

Art. 97. The dower is the sole property of the wife; if she has attained puberty she can dispose of it in all cases.

Dower is the wife's sole property.

Without the consent of her husband, her father, her grandfather, or the executor, she can alienate it, pledge it, let it out by way of loan or on hire, and can make a free gift of it to her husband, to her relations, or to third parties.

Notes.

Bahrul-Rayek, Vol. 3, p. 161.

Zaidunil-Ambani, Vol. 1, p. 148.

When a Mahomedan widow realised the full amount of her dower from the profits of the estate in her possession, for twenty years, held, that the estate became her actual property—*Sahibjan Khatoon v. Dianut Beebee*, 3 Sel. Rep., S. D. A., 16 (1820).

See *Shaikh Nasoo v. Mahatab Beebee*, 4 W. R., 7 (1865); Married Women's Property Act (III of 1874).

Art. 98. Where wife has received her dower in full and makes a gift of the whole or a part of it to her husband, and the marriage is dissolved by repudiation before consummation, the husband is entitled to claim

In case of gift of dower by wife, husband is entitled to half the dower.

half of the dower. The wife is bound to return the half even when she has made a gift of the dower to a stranger, who, acting under her authority, has received it from the husband or his surety.

Where the wife, before receiving her dower, makes a gift to her husband of the whole amount or of the deferred portion, the husband has no claim against her.

Where the wife makes a gift to her husband of the whole or of half the dower, the husband, if the marriage is dissolved before consummation, cannot compel her to restore the half.

In no case can a father make a gift of a part of the dower settled on his minor daughter.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 31.

Baillie, Chap. 7, pp. 119, 121 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 49 ; Zaidunil-Ambani, Vol. 1, p. 143.

Wife cannot be forced to relinquish her dower in favour of her husband, guardian or relations.

Art. 99. A wife cannot be compelled to relinquish a part of the dower in favour of her husband, her guardian or even her relations.

Should the wife die before receiving the whole of her dower, her heirs are entitled to demand from her husband or his heirs, the balance due after deducting the share devolving upon the husband from the wife's estate, if she died before him.

Notes.

Bahrr-ul-Rayek, Vol. 3, p. 161.

Zaidunil-Ambani, Vol. 1, p. 148.

Where a suit for dower was brought by the heir of a Mahomedan widow, and while it was pending, the heirs of the deceased husband of the widow mortgaged the property which had belonged to the deceased husband in his lifetime, held, that the heirs of

the widow could only execute the decree which they got against the assets of the husband which the heirs of the husband had in their possession—*Yasin Khan v. Yar Khan*, I. L. R., 19 All., 504 (1897).

See *Bazayet Hossein v. Dooli Chand*, I. L. R., 4 Cal., 402, P. C. (1878); *Ali Mahomed v. Azizullah*, I. L. R., All., 50 (1883); *Hadi Ali v. Akbar Ali*, I. L. R., 20 All., 262 (1898); *Ghulam Ali v. Sagir-Ul-Nissa*, I. L. R., 23 All., 432 (1901); *Bholanath v. Maqbul-un-Nisa*, I. L. R., 26 All., 28 (1903); *Ram Baksh v. Mughlani Khanan*, I. L. R., 26 All., 266 (1903).

The heirs of a widow are entitled according to Mahomedan law to demand her dower from her husband's heirs—*Whahid-Un-Nissa v. Shubrattun*, 6 B. L. R., 54 (1870).

See *Gholam Husun Ali v. Zeinub Beebee*, 1 Sel. Rep., S. D. A. 63 (1801); *Ali Buksh v. Kaïm Beebee*, 1 Sel. Rep., S. A. D., 110 (1804); *Wuzeerun Beebee v. Hossan Khan*, S. D. A., Ben., 841 (1856); *Janee Khanum v. Amatool Fatima Khanum*, 8 W. R., 53 (1867).

SECTION VI.—SURETYSHIP IN DOWER. LOSS AND CONSUMPTION OF DOWER. WIFE'S CLAIM TO DOWER.

(Arts. 100—103.)

Art. 100. The guardian of the husband or of the wife whether minor or adult, can, when in good health, become surety for the dower that the husband has settled on her, provided the suretyship is approved by the wife herself or by her guardian, if she is a minor. But the guardian during his death-bed illness, cannot become surety for the payment of the dower, if either the wife or the husband is his heir. Even when they are not his heirs, he can only stand surety to the extent of a third of his property.

Where guardian of minor husband or wife may stand surety for dower.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 386, 387.

Baillie, Chap. 7, p. 141, Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 54; Zaidunil-Ambani, Vol. 1, p. 149; Clavel, Vol. 1, p. 70.

Where surety has been given for dower, wife can claim from either husband or surety.

Art. 101. The wife for whose dower surety is given, may claim its payment either from the husband when he attains majority, or from the surety, even though the latter should be her own guardian. The surety who makes payment for a dower that he guaranteed, has no claim against the husband, unless the guarantee was given, with the latter's authority.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 387.

Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 101; Zaidunil-Ambani, Vol. 1, p. 152; Clavel, Vol. 1, p. 71.

See Sections 128, 140, 145 of the Indian Contract Act (IX of 1872).

Where father is liable for dower in respect of his minor son destitute of means.

Art. 102. The father who has given his minor son, destitute of means in marriage, is not personally bound to pay the dower unless he becomes surety for its payment.

Where the father pays the dower for which he is surety, he cannot claim its recovery from such minor, unless at the time payment was made, he declared before witnesses that he intended to make such claim.

Should a father become surety for dower on behalf of his minor son, and die before discharging it, the son's wife may sue his estate for payment. In this case the heirs may recover such payment from the minor son's share in the father's estate.

A father, as guardian, may dispose of the property of his minor children, and so, when a minor has property of his own, the father can be compelled to pay the dower out of such property, even when he has not guaranteed its payment.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 386, 387.

Baillie, Chap. 7, p. 140; Zaidunil-Ambani, Vol. 1, p. 153.

Art. 103. Where the property of which the dower consists is specified, and happens to perish while in the husband's possession, or is consumed by him before delivery to the wife, or if a third party establishes a right to it after it has been delivered to her, she can compel her husband to deliver to her things of a like nature, or their value if they do not exist.

Wife's claim in respect of dower which is lost.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 31.

Baillie, Chap. 7, p. 119 ; *Zaidu-nil-Ambani*, Vol. 1, p. 155.

SECTION VII.—DISPUTES RELATING TO DOWER.

(Arts. 104—111.)

Art 104. After a wife has surrendered herself to her husband, the fact of the marriage being consummated implies that the prompt portion of the dower has been paid, and should the wife declare that no payment at all has been made, her claim to the amount would not be admissible. If however, she declares that a part of the prompt dower¹ was paid, her claim to the balance would hold good.

Wife's claim to prompt dower after she has surrendered herself to her husband.

This rule would not apply to localities, where it is an established custom that the husband does not advance any portion of the dower, until after consummation of the marriage.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 393.

Baillie, Chap. 7, p. 124 ; *Hamilton's Hedayah*, Vol. 1, Bk. 2, Chap. 3, p. 54 ; *Zaidu-nil-Ambani*, Vol. 1, p. 158.

See Notes to Art. 213.

¹ See Art. 73.

Where there
is a dispute
as to dower.

Art. 105. Where a dispute arises between the husband and wife as to dower, one party claiming that it has been fixed though unable to prove it, while the other party denies that the dower has been fixed, the latter shall be called upon to make the denial upon oath, and in case of refusal the judge shall decide against the party refusing. If the oath is taken, and it is the wife who contends that the dower was fixed, the proper dower¹ shall be decreed, provided the amount does not exceed that which is claimed by her. If it is the husband who maintains that the dower was fixed, the amount of proper dower shall not be decreed below that which is stated by him. Where the dispute arises after repudiation but before consummation, *Mutah*² instead of proper dower, is due.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 391, 392.

Baillie, Bk. 1, Chap. 7, p. 132 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 55 ; Zaidunil-Ambani, Vol. 1, p. 158.

See Sections 8 and 12 of the Indian Oaths Act (X of 1873.)

Where wife
is entitled to
proper
dower.

Art. 106. Where there is a dispute between husband and wife as to the amount of dower agreed upon, the amount of proper dower is to be taken as a basis of settlement: whether the dispute takes place during the subsistence of the marriage before or after its consummation, or whether it arises after the dissolution of a marriage that has been consummated.

Should the amount of proper dower be equal to or higher than that claimed by the wife, her sworn declaration shall be accepted, unless the husband can adduce proof to the contrary. Should it be equal to or lower than that stated by the husband, his declaration on oath shall hold good in default of proof by the wife.

¹ See Arts. 78.

² See Art. 90.

Where neither claim is based on the proper dower, both parties shall be put on oath, and shall be called upon to adduce evidence regarding their respective claims and the judge shall decide accordingly.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 34 ; Radd-ul-Muhtâr, Vol. 2, p. 392.

Baillie, Chap. 7, pp. 130,131 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 56 ; Zaidunil-Ambani, Vol. 1, p. 160 ; Clavel, Vol. 1, p. 77.

Art. 107. The death of one of the parties does not alter the procedure, and all disputes between the survivor and the heirs of the deceased regarding the amount of the dower, are to be decided in the manner laid down in the preceding Article.

Death of either husband or wife does not alter procedure laid down in preceding Article.

When both parties have died, and a dispute arises between their respective heirs, regarding the amount of dower, the declaration made by the heirs of the husband is to be accepted, and the amount of dower admitted by them shall be decreed in favour of the wife's heirs.

Where the dispute refers to the fixation of dower, and the husband's heirs deny that any dower was fixed and refuse to take oath, the judge shall decree the proper dower.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 393 ; Fatawa-i-Almgiri, Vol. 2, p. 35.

Baillie, Bk. 1, Chap. 7, p. 132 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 56. Zaidunil-Ambani, Vol. 1, p. 163.

Art. 108. In the cases indicated in the three preceding Articles, the proper dower is only to be paid in full to the wife, when the dispute takes place before the marriage is consummated.

Where proper dower is payable in full and where deductions are to be made.

Should the dispute take place after the marriage has been consummated, and the husband during his lifetime, or his heirs after his death, contend that the wife has received a part of the dower, and should it be an invariable practice in the locality that the wife does not surrender herself to her husband before receiving a part of the dower, the wife shall be called upon to declare what amount of dower she has received. If she refuses to make the declaration, the amount of proper dower shall be paid to her, after deduction of the prompt portion in accordance with the custom of the locality.

This deduction must therefore be made :

1. When the parties are agreed as to the amount of dower specified in the contract.

2. When the heirs of the husband deny that any dower was stipulated and, by their refusal to take the oath, entitle the wife to proper dower.

3. When they dispute the wife's right to the amount which she claims, and which is based upon the proper dower.

4. When, after the decease of both husband and wife, the husband's heirs, whose statement has been accepted admit the amount they owe the wife.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 393, 394.

Baillie, Bk. 1, Chap. 7, p. 133 ; Zaidunil-Ambani, Vol. 1, p. 166 ; Clavel, Vol. 1, p. 82.

Where a man, with a view to marriage advances maintenance to a woman observing *Iddat*.

Art. 109. Where a suitor advances a sum of money for the maintenance of a woman in *Iddat*,¹ consequent upon either repudiation or widowhood, and at the same time agrees to marry her after completion of such *Iddat*, he is entitled in the event of the woman's refusal to marry him, to claim the sum advanced.

¹ See Art. 310.

Where no agreement is made, and he subsequently marries her, his claim for the recovery of the amount advanced is not admissible.

Even when an agreement is made, he is not entitled to recover the price of food furnished to the woman.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 395, 396.

Baillie, Bk. 1, Chap. 7, p. 134 ; Zaidunil-Ambani, Vol. 1, p. 167.

See Section 73 of the Indian Contract Act (IX of 1872).

Art. 110. Where a man, with a view to marriage, sends presents to a woman, or advances her the whole or part of the dower, and she refuses to marry him, or her guardian refuses permission, or if she dies or the man himself changes his mind before marriage, in each case he is entitled to a return of the gifts or things advanced as dower, provided they exist even in a state of deterioration, or their equivalent value in the case of loss or consumption.

Where a man makes presents or advances dower to a woman.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 395.

Zaidunil-Ambani, Vol. 1, p. 168 ; Clavel, Vol. 1, p. 82.

Art. 111. Where disputes arise between the married parties as to the intention with which the husband gave certain sums or movable effects, or as to food sent by the husband to the wife, before or after the solemnization of marriage, the husband contending that he sent them on account of dower, while the wife maintains that they were merely presents, the husband's sworn declaration is to be accepted with regard to those articles which are not usually offered in that locality as presents. The wife's word is accepted with regard to those articles which are usually offered as presents.

Where disputes arise between husband and wife as to intention with which the husband gave sums of money or other movable property.

In a case where the husband's sworn declaration has been accepted, the wife, if the articles still exist, can either keep them on account of dower, or return them to the husband, and demand payment of the remainder of the dower, or of the whole dower in the event of her having received no part of it.

If the wife has lost or consumed that which was advanced as dower, its value is to be deducted from the full dower.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 394.

Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, pp. 56, 57
Zaidu-nil-Ambani, vol. 1, p. 170.

SECTION VIII.—THE WIFE'S MARRIAGE OUTFIT. THE HOUSEHOLD EFFECTS, AND DISPUTES RELATING THERETO.

(Arts. 112—119.)

Art. 112. Property is not the object of marriage.

Wife herself
is not obliged
to pay for her
marriage
outfit.

The wife cannot be obliged to use her own property, or the dower she receives for the acquisition of her marriage outfit. The father is not bound to defray the expenses of the daughter's marriage outfit.

If the marriage outfit which the wife brings is not proportionate in value to the dower paid by the husband, or if she does not bring a marriage outfit at all, the husband cannot claim one either from the wife or her father, nor can he sue them for a reduction of the dower, which he had purposely increased with a view to the purchase of a costly marriage outfit.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 398, 399.

Baillie, Bk. 1, Chap. 7, p. 144; Zaidu-nil-Ambani, Vol. 1, p. 172.

Art. 113. Where a father in good health, makes a present of a marriage outfit to his adult daughter, it becomes her property as soon as she takes possession of it. Neither the father, nor his heirs, can subsequently dispossess her of it.

Where father makes a present of marriage outfit to his adult daughter.

Where she obtains possession of the marriage outfit during her father's death-illness, such outfit becomes her property only by consent of the other heirs.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 396, 397.

Baillie, Bk. 1, Chap. 7, pp. 143—145 ; Zaidunil-Ambani, Vol. 1, p. 174.

Art. 114. Where a father in good health, with his own money purchases a marriage outfit for his minor daughter, such outfit becomes her property by the mere fact of her father making such purchase :

Where father purchases his minor daughter's marriage outfit.

Provided that when the purchase is made, the daughter is aware that her father makes such purchase while in good health, the outfit becomes her property whether she takes possession or not, neither can the father nor his heirs subsequently dispossess her of it.

Where the father dies before paying for the outfit, the vendor may realise the cost of such outfit from the father's estate. The heirs cannot recover the amount from the daughter.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 397.

Zaidunil-Ambani, Vol. 1 p. 175.

Art. 115. Where the father purchases his daughter's marriage outfit from the amount of the dower paid to her, she is entitled to demand from him the balance of the dower in his hands.

Where father purchases marriage outfit from his daughter's dower.

Notes.

Bahrr-ul-Rayek, Vol. 3, p. 161.

Zaidu-nil-Ambani, Vol. 1, p. 176 ; Clavel, Vol. 1, pp. 86, 87.

Marriage
outfit is
the exclusive
property of
the wife.

Art. 116. The marriage outfit is the exclusive property of the wife. The husband cannot lay claim to any part of it, nor can he compel her to place any articles belonging to her, at his, or at his guest's disposal ; he can only make use of them with her consent.

Where, during the subsistence of the marriage or after its dissolution, the husband takes any article forming part of the marriage outfit, the wife may sue him for its recovery or its value in case of loss or destruction.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 707, 708.

Zaidu-nil-Ambani, Vol. 1, p. 176.

Where there
is a dispute
as to the
marriage
outfit.

Art. 117. Where a father makes over to his daughter a marriage outfit which he himself has procured, and he or his heirs subsequently claim that a part or the whole of such outfit was merely given by way of loan, while the daughter, or if she is dead, her husband, maintains that it was her own property, local custom shall serve as a guide for the settlement of the dispute.

If it is the general practice for a father to provide his daughter with such a marriage outfit, the declaration of the daughter or of her husband is to be accepted, unless the father or his heirs adduce proof to the contrary. If it is not the general practice, and if the marriage outfit seems more than is necessary for a woman of her station, the father's declaration or that of his heirs shall be accepted.

Where the mother sends a marriage outfit the above provision also applies.

Notes.

Bahrr-ul-Rayek, Vol. 3, p. 200 ; Radd-ul-Muhtâr, Vol. 2, pp. 397, 398.

Zaidu-nil-Ambani, Vol. 1, p. 177.

Art. 118. Where there is a dispute between the husband and wife, during the subsistence of the marriage or after its dissolution, as to the household effects of the house in which they live, those articles which are more specially used by women shall be assigned to the wife, unless the husband can adduce proof to the contrary.

Articles that belong to the husband and wife in case of dispute after marriage.

Those articles which are in general use among men or can be used by either sex, shall be allotted to the husband, unless the wife adduces proof to the contrary. Whichever party establishes ownership to any particular article, it shall be allotted to that party. As to goods of merchandise, they shall be assigned to that party who is engaged in trade.

Notes.

Radd-ul-Muhtâr, Vol. 4, pp. 475, 476 ; Fatawa Kazi Khan, Vol. 1, p. 182 ; Fatawa-i-Alamgiri, Vol. 2, p. 39.

Baillie, Bk. 1, Chap. 7, p. 145 ; Zaidu-nil-Ambani, Vol. 1, p. 179.

Art. 119. Where, after the decease of either husband or wife, there is a dispute as to the household effects, those articles which can be used by both parties shall be allotted to the survivor, unless proof is adduced to the contrary.

In case of dispute after death of either husband or wife.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 476.

Baillie, Bk. 1, Chap. 7, p. 145 ; Zaidu-nil-Ambani, Vol. 1, p. 180.

CHAPTER VIII.

THE MARRIAGE OF MUSLIMS WITH CHRISTIAN WOMEN OR JEWESSES, AND THE NATURE OF THE MARRIAGES OF NON-MUSLIMS ON THEIR SUBSEQUENTLY EMBRACING ISLAM.

(Arts. 120—130.)

SECTION I.—THE MARRIAGE OF MUSLIMS WITH CHRISTIAN WOMEN AND JEWESSES.

(Arts. 120—125.)

Where
Muslim
may marry
Christians
or Jewesses.

Art. 120. It is lawful for Muslim men to marry Christian women and Jewesses, subjects of a Muslim State or foreigners. The marriage is validly contracted by the intervention of a Christian or Jewish guardian and in the presence of two Christian or Jewish witnesses, even though they do not profess the same religion as the woman. The testimony of these witnesses serves as proof of the marriage in case of the wife's denial but not in the case of the husband's denial.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 310 ; Sharh-i-Vikaya, Vol. 2, p. 10.

Baillie, Bk. 1, Chap. 1, p. 6 ; Zaidunil-Ambani, Vol. 1, p. 182.

See The Indian Evidence Act (I of 1872), ss. 59, 60.

A Muslim
with a Mus-
lim wife may
also take to
a Christian
or Jewish
wife at the
same time.

Art. 121. A Muslim, already married to a Muslim woman, can also marry a *Kitabiah*, that is to say, a Christian woman or a Jewess, in the same way as he can marry a Muslim woman when he has already a Christian or Jewish wife. Both wives must be treated with perfect equality.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 10.

Zaidu-nil-Ambani, Vol. 1, p. 183.

Art. 122. A Muslim woman can only marry a Muslim;¹ she can neither marry an idolater, nor a Christian, nor a Jew; and a marriage contracted with any one of these is void.

A Muslim-woman can only marry a Muslim husband.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 10.

Zaidu-nil-Ambani, Vol. 1, p. 183.

Both the Sunni and Shiah schools prohibit marriage between a Muslim woman and a non-Muslim man—*Himmut Bahadoor v. Sahebzadee Begum*, 14 W. R., 125 (1870).

A woman of the Shiah sect cannot contract a valid marriage with a Christian—*Bakhshi Kishen Prasad v. Thakur Das*, I. L. R., 19 All., 375 (1897).

See *Monowar Khan v. Abdoollah Khan*, 3 N.-W. P., H. C. R., 177 (1871); In the matter of *Ram Kumari*, I. L. R., 18 Cal., 264 (1891); *Abdool Razack v. Aga Mahomed Jaffer Bindaneem*, I. L. R., 21 Cal., 666; I. R., 21 I. A., 56 (1893).

Art. 123. Where a Christian wife, married to a Muslim husband, becomes a Jewess, or where a Jewess becomes a Christian, the marriage none the less remains valid.

Where a Christian becomes a Jewess.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 10.

Baillie, Bk. 1, Chap. 3, p. 41; Zaidu-nil-Ambani, Vol. 1, p. 184.

Art. 124. The children of either sex born of the marriage between a Muslim and a Christian woman or a Jewess, follow their father's religion.

Children follow their father's religion.

¹ See Arts. 31, 32.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 427.

Baillie, Bk. 1, Chap. 3, p. 41 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 5, p. 64 ; Zaidunil-Ambani, Vol. 1, p. 184.

Difference of religion deprives husband of his right to wife's estate and *vice versa*.

Art. 125. Difference of religion deprives the husband of all right to inherit his wife's estate, and the wife of all right to inherit her husband's estate.

Notes.

Bahrr-ul-Rayek, Vol. 8, p. 557 ; Radd-ul-Muhtâr Vol. 2, p. 421.

Zaidunil-Ambani, Vol. 1, p. 185.

SECTION II. MARRIAGES BETWEEN NON-MUSLIMS, WHERE BOTH OR ONE OF THE PARTIES EMBRACE ISLAM.

(Arts. 126—130.)

Where the wife of a non-Muslim embraces Islam.

Art. 126. Where the wife of a non-Muslim embraces Islam, that faith, must be presented to her husband. If he embraces the faith the marriage remains intact, unless the wife is related to him within the prohibited degrees¹ of kindred, when the marriage must be cancelled.

If the husband refuses Islam, the Judge shall pronounce the dissolution of the marriage, even when the husband is a minor, possessing sufficient understanding, and even when he is insane.

Where the minor has not sufficient understanding in the matter of religion, the Judge shall wait until he attains it.

If the husband is insane, the Judge, without waiting until he has recovered his intellectual faculties, shall present Islam to his father or mother ; in the event of one of them accepting the faith, the son will be deemed to have accepted it also, and the marriage will remain

¹ See Art. 22.

undissolved. But should the lunatic's parents refuse to embrace Islam, the marriage is to be dissolved.

Where the insane husband has neither father nor mother, the Judge, in order that he may pronounce the dissolution of the marriage, shall appoint a guardian for the purpose.

This dissolution of the marriage pronounced by the Judge in consequence of the refusal of the husband, when he is sane, or of one of his parents when the husband is insane, operates as repudiation. The marriage is deemed to exist until the Judge has pronounced its dissolution.¹

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 419, 420, 421, 422 ; Tahtavi, Vol. 2, p. 82.

Baillie, Bk. 1, Chap. 10, p. 180 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 5, pp. 63, 64 ; Vol. 2, p. 82 ; Zaidunil-Ambani, Vol. 1, p. 185.

Art. 127. Where the husband of a Christian or Jewish wife turns Muslim, the marriage cannot be dissolved, but when the wife turns idolatress, and on being asked to embrace Islam she consents, the marriage will remain intact.

Where the husband of a non-Muslim wife embraces Islam.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 419, 420, 421, 422 ; Tahtavi, Vol. 2, p. 82.

Baillie, Bk. 1, Chap. 10, p. 181 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 5, pp. 63, 64, 65 ; Zaidunil-Ambani, Vol. 1, p. 189.

See *Helen Skinner v. Sophia Evelina Orde*, 10 B. L. R., 125, P. C. (1871) ; *Robert Skinner v. Charlotte Skinner*, I. L. R., 25 Cal., 537, P. C. (1897) ; Act III of 1872.

¹ See Art. 85.

Where both husband and wife embrace Islam together.

Art. 128. Where both the husband and the wife embrace Islam together, the marriage and all its consequences are valid unless it was contracted within prohibited degrees,¹ in which case the Judge shall pronounce its dissolution.

Where the contracting parties to a marriage are non-Muslim, the Judge cannot dissolve the marriage, however unlawful it may be, except at the parties' own request; but he may pronounce the dissolution of a marriage contracted by a Christian woman or a Jewess while she is observing *Iddat*², consequent upon her repudiation by a Muslim husband.

Notes.

Rudd-ul-Muhtâr, Vol. 2, pp. 419, 420.

Zaidu-nil-Ambani, Vol. 1, p. 189.

Religion of children when husband or wife embrace Islam.

Art. 129. Where the married parties are non-Muslim and the husband embraces Islam, all the children already born of the marriage before his conversion to Islam shall be brought up in the Muslim religion. So also must any children born to them after Islam is presented to his wife. This rule only applies when the children are settled in *Darul Islam*,³ whether the parent who accepts the faith resides there or not.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 427; Fatawa-i-Alamgiri, Vol. 2, p. 46.

Baillie, Bk. 1, Chap. 10, p. 185; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 5, p. 64; Zaidu-nil-Ambani, Vol. 1, p. 191.

Where children are to embrace Islam.

Art. 130. Minor children who have lost their father, are not bound to embrace Islam in the event of their grandfather accepting that faith.

¹ See Art. 22.

² See Art. 310.

³ "The land of Islam." See Dr. W. W. Hunter's Indian Mussalmans, and Hughes Dictionary of Islam.

A child, whether of sound mind or not during minority, follows the faith of that parent who embraced Islam.

The child is only released from this obligation, when he attains majority in full possession of his intellectual faculties.

Where a child attains majority and is insane or an imbecile, he still continues to be under the control of his parents.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 427; Fatawa-i-Alamgiri, Vol. 2, p. 46.

Zaidu-nil-Ambani, Vol. 1, p. 192.

CHAPTER IX.

VOID AND INVALID MARRIAGES.

(Arts. 131—144.)

SECTION I.—VOID MARRIAGES.

(Arts. 131—137.)

Art. 131. A marriage legally prohibited for reasons of consanguinity, affinity, or fosterage, is void.¹

If the married parties do not separate voluntarily, they must be separated by a Judge.

Where the husband contracts the marriage in bad faith, he renders himself liable to a heavy punishment, either with fine or imprisonment, and where he acts in good faith, he is liable to a lighter punishment.

Notes.

Tahtavi, Vol. 2, p. 13; Fatawa Kazi Khan, Vol. 1, p. 165.

Baillie, Bk. 1, Chap. 8, p. 154; Zaidu-nil-Ambani, Vol. 1, p. 193.

Ties of consanguinity, affinity, or fosterage, render a marriage void.

¹ See Arts. 21, 22, 23.

Marriage with a woman already married, or in *Iddat* is also void.

Art. 132. Where a man contracts marriage with a woman, who is already married, or with a woman who is observing *Iddat*,¹ consequent upon repudiation or widowhood, such marriage is void. The man who contracts such a marriage renders himself liable to a heavy or light punishment according as he acts in good faith or not.

Notes.

Fatawa Kazi Khan, Vol. 1, pp. 167, 168.

Zaidu-nil-Ambani, Vol. 1, p. 195 ; Clavel, Vol. 1, pp. 108, 109, 17.

Until a Mahomedan husband repudiates his wife, she cannot lawfully marry another man—*Ameena v. Kuttoo Khan*, 7 Sel. Rep., S. D. A., 32 (1841).

See Sections 493 and 494 of the Indian Penal Code (Act XLV of 1860).

Marriage with two sisters under one contract is void, and circumstances under which one marriage is valid.

Art. 133. Where a man contracts marriage by a single contract, with two sisters² who are unmarried and not observing *Iddat*,¹ the marriage is void ; but if one sister is observing *Iddat*, the marriage with the other sister is valid. In this case the two sisters are not entitled to dower if the cancelment of the marriage precedes its consummation.

Where the two sisters are married by two successive contracts, the marriage of prior date, if admitted and regularly contracted, is valid, but the other marriage is void.

Where husband has had sexual intercourse with the sister married under the contract of later date, he must wait until her *Iddat* has expired before he can cohabit with the other sister, whose prior marriage is valid.

Where it cannot be established, which marriage was contracted first, both marriages are radically void,

¹ See Art. 310.

² See Art. 26.

unless one was void *ab initio*. If, however, cancellation takes place before either marriage is consummated, the two sisters are entitled to one-half of the stipulated dower, provided their dowers are equal and of like nature, and that both claim their marriage to be of prior date without being able to adduce proof in support of such claim. In this case where cancellation has preceded consummation of the marriage, the husband is at once free to marry whichever sister he pleases.

Where one sister establishes the priority of her marriage, that marriage shall be valid, and she is entitled to the full half of the dower.

Where the marriage is contracted without dower being settled, the two sisters have only one single *Mutah*¹ or present between them.

Where cancelment of the marriage takes place after consummation of the marriage, each of the two sisters is entitled to her full dower, in the same way as two sisters married by a single contract.

. Notes.

Sharh-i-Vikaya, Vol. 2, p. 17 ; Radd-ul-Muhtâr, Vol. 2, pp. 309—311.

Baillie, Bk. 1, Chap. 3, pp. 31, 32 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 1, pp. 28, 29 ; Zaidunil-Ambani, Vol. 1, p. 196.

Where a Mahomedan married a woman first, and afterwards married her sister, it was held that the marriage with the wife's sister was invalid in consequence of his previous marriage with her sister. No defect, however, arises in the first marriage from the invalidity of the second—*Shureefoonissa v. Khizuroonisa*, 3 Sel. Rep., S. D. A., 280 (1824).

Where a Mahomedan marries two sisters by one contract, and one marriage is known to precede the other, the marriage which

¹ See Art. 90.

is the later of the two is absolutely void—*Azizunnissa Khatoon v. Karimunnissa Khatoon*, I. L. R., 23 Cal., 130 (1895).

Marriages
which are
absolutely
void.

Art. 134. The following marriages are absolutely void :—

1. The marriage contracted by a man with a woman he has repudiated three times¹ and who has not remarried, or who has remarried, but has not been repudiated by the last husband, or who has been left a widow by the second husband after consummation of the marriage.

2. The marriage with an idolatress.

3. The marriage with a fifth woman, before the fourth has been repudiated and the period of her *Iddat*² expired.

4. The marriage contracted without witnesses.³

In each of the above cases, the Judge can always pronounce the dissolution of the marriage. The married parties are not bound to wait for the Judge to cancel the marriage : either party may separate, provided that due notice is given to the other party.

Notes.

Sharh-i-Vikaya, Vol. 2, p. 18 ; Fatawa-i-Alamgiri, Vol. 2, pp. 1, 7, 10, 11 ; Radd-ul-Muhtâr, Vol. 2, pp. 379—381.

Baillie, Bk. 1, Chap. 8, p. 156 ; Zaidunil-Ambani, Vol. 1, p. 200 ; Clavel, Vol. 1, p. 113.

According to Mahomedan law, a man cannot legally have more than four wives living at the same time—*Shumsoonisa v. Gouhur Ali*, 4 Sel. Rep., S. D. A., 359 (1827).

As to witnesses necessary in a Mahomedan marriage—*Butoolun v. Koolsoom*, 25 W. R., 444 (1876) ; See Notes to Art. 7.

¹ See Art. 224.

² See Art. 310.

³ See Art. 18.

Art. 135. The marriages declared in the preceding Article to be absolutely void, create no prohibition for either party to marry the kindred without the prohibited degree of the other party to marriage, so long as cancellation precedes consummation, and also they give the husband and wife no right to inherit from each other.

Legal effects of the foregoing void marriages.

Children born of these marriages are deemed legitimate, provided they are born under the conditions laid down in the Chapter on Paternity and Filiation¹.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 379, 380 ; Fatawa-i-Alamgiri, Vol. 2, p. 5.

Baillie, Bk. 1, Chap. 8, p. 157 ; Zaidunil-Ambani, Vol. 1, p. 201.

See *Syed Jummeeddeen Mahomed v. Muheeoodeen Bebee*, S. D. A., Ben., 932 (1853) ;

Art. 136. Where two guardians of the same degree of relationship and acting independently of each other, give the ward in marriage to a separate individual, the marriage first contracted shall alone be valid, and the other null and void. If it is not known which contract was entered into first, or if the two contracts were made at the same time, both marriages are void.

Where two guardians, acting independently of each other, give their ward in marriage.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 12.

Zaidunil-Ambani, Vol. 1, p. 201.

Art. 137. Where a guardian has under his guardianship an adult woman, with whom his marriage is not prohibited, and such guardian marries her himself, without having first obtained her consent, the marriage is void, even though the woman, when informed of her marriage, remains silent, or gives her express consent after the marriage is contracted.

Where guardian's marriage with his adult ward is void.

¹ See Bk. IV, Chap. I, Section II, Arts. 341, 342, 343.

Notes.

Fatawa-i-Alamgiri, Vol. 2, pp. 14, 15 ; Radd-ul-Muhtâr, Vol. 2, p. 325.

Zaidu-nil-Ambani, Vol. 1, p. 202.

SECTION II. INVALID MARRIAGES.

(Arts. 138—144.)

Ratification
of guardian
necessary
where minor
contracts
marriage.

Art. 138. Where a minor of either sex who has reached the age of discretion, but is still under a guardian, or where an incapable adult contracts marriage without the guardian's consent, the marriage is not binding unless it is ratified by the guardian.

Where the guardian ratifies the marriage, the contract is valid, provided that the dower,¹ in the case of a minor girl, is not too low, and in the case of a minor boy, not too high ; but if the dower seriously prejudices either the boy or the girl, the marriage shall be cancelled whether the guardian ratifies it or not.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 99 ; Bahrr-ul-Rayek, Vol. 3, p. 83.

Baillie, Bk. 1, Chap. 1, pp. 4, 5 ; Zaidu-nil-Ambani, Vol. 1, p. 206.

See Section 196 of the Indian Contract Act (IX of 1872).

Where a
remote rela-
tion con-
tracts mar-
riage when
there is a
nearer rela-
tion.

Art. 139. Where a remote relation gives a minor girl in marriage, when there is a nearer relation competent to exercise the guardianship, the marriage is invalid, unless it is approved of by the nearer relation who may cancel the marriage.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 129.

Baillie, Bk. 1, Chap. 4, p. 49 ; Zaidu-nil-Ambani, Vol. 1, p. 207.

¹ See Art. 78.

Art. 140. Where a man authorizes an agent to contract him in marriage but mentions no particular woman, and the agent gives him in marriage to a woman who is suffering from some malady, such marriage is valid; but where he contracts him in marriage to his minor daughter or his ward, such marriage is only valid when it is ratified by the principal.

Cases in which marriage is contracted by an agent.

Where a man authorizes an agent¹ to contract him in marriage to one woman only, but the agent exceeds his powers and gives him in marriage to two women by a single contract, the principal is not obliged to acknowledge either, until he has ratified the contract in respect of one or both of them.

Where the agent gives his principal in marriage to two women by two successive contracts, the first marriage alone is binding, and the second is binding subject to ratification by the principal.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 352, 353; Bahrr-ul-Rayek, Vol. 3, pp. 147, 151.

Baillie, Bk. 1, Chap. 6, pp. 77, 79; Zaidû-nîl-Ambani, Vol. 1, p. 208.

Art. 141. Where a man authorizes an agent to contract him in marriage to a certain woman whom he indicates, but the agent gives him in marriage to another, the marriage is not valid, unless it is ratified by the principal.

Ratification of marriage by principal.

The same rule applies where the agent contracts him in marriage, and provides for a larger dower than he was authorized to do.

Where the principal is not aware that his agent has settled a larger dower than he was authorized to fix,

¹ See Arts. 57, 58.

the marriage is invalid, even if he has had sexual intercourse with the woman.

The agent cannot compel the principal to acknowledge the marriage, even though the agent himself undertakes to pay the difference in the dower.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 352; Fatawa-i-Alamgiri, Vol. 2, p. 19.

Baillie, Bk. 1, Chap. 6, p. 80; Zaidunil-Ambani, Vol. 1, p. 209.

See Sections 19 and 196 of the Indian Contract Act (IX of 1872).

Where marriage contracted by agent is not binding upon a woman.

Art. 142. Where a woman authorizes an agent¹ to contract her in marriage to a man, but mentions no particular person, and the agent gives her in marriage to himself or to his father, or to his son, the marriage is invalid unless she ratifies it.

Where the agent gives her in marriage to a man and causes her serious loss by accepting a dower smaller than is her due, both the woman or her guardian may have the marriage cancelled, unless the difference in dower is made good.

Where the agent gives her in marriage to a man who is not her equal², the marriage is invalid; but where he gives her in marriage to a man who is her equal and who settles upon her the proper dower,³ the marriage is binding even though the man chosen by the agent possesses some physical defect or suffers from some malady or disease.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 18; Radd-ul-Muhtâr, Vol. 2, pp. 352, 355.

Baillie, Bk. 1, Chap. 4, pp. 76, 77; Zaidunil-Ambani, Vol. 1, p. 210.

¹ See Arts. 57, 58.

² See Art. 62.

³ See Art. 78.

Art. 143. Where in a marriage the man deceives the woman and gives himself a false title or misrepresents his condition in life, and the woman discovers the fact after the marriage, both she and her guardian may either ratify or cancel such marriage.

Marriage under misrepresentation.

Notes.

Tahtavi, Vol. 2, pp. 41, 42.

Zaidu-nil-Ambani, Vol. 1, p. 213.

See Sections 18, 196, 197 of the Indian Contract Act (IX of 1872).

Art. 144. The marriage proposed or accepted by an unauthorized person remains in abeyance, until it is either ratified or cancelled by the party interested.

Marriage contracted by a person without authority.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 354 ; Fatawa-i-Alam-giri, Vol. 2, p. 20.

Zaidu-nil-Ambani, Vol. 1, p. 214 ; Clavel, Vol. 1, p. 118.

CHAPTER X.

PROOFS OF MARRIAGE.

(Arts. 145—149.)

Art. 145. Where there is a dispute between husband and wife as to whether they are actually married, the marriage is proved by the testimony of two male witnesses or of one male and two female witnesses whose integrity is beyond question.

How marriage is proved.

Where a person claims to have contracted marriage with a woman and she denies the marriage, or *vice versa*, the plaintiff, in default of proof in support of the claim, may put the defendant on oath ; if the defendant takes the oath, the plaintiff is non-suited ; if the oath is refused, the claim is proved and the marriage established.

Notes.

Hidaya, Vol. 2, p. 286.

Baillie, Bk. 5, Chap. 2, pp. 404, 405 ; Zaidunil-Ambani, Vol. 1, p. 215 ; Clavel, Vol. 1, p. 100.

See the Indian Evidence Act (I of 1872), Part II, Chap. 3, "On Proof"; Section 12 of the Indian Oaths Act (X of 1873) ; *Queen v. Khyroollah*, 6 W. R. Cr., 21, F. B., *per* Peacock, C. J. (1866).

Witnesses
who are des-
cendants of
the parties.

Art. 146. Where either the husband or the wife, seeks to prove his or her marriage, the evidence of their descendants cannot be accepted in support of such claim.

The same rule applies where one witness is a descendant of the husband and the other a descendant of the wife. If both witnesses are descendants of the same party their evidence can only be admitted against their ascendant, when called for by the other party.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 296.

Zaidunil-Ambani, Vol. 1, p. 216.

Guardian's
testimony.

Art. 147. The testimony of a guardian against his ward cannot be admitted in case of a denial of marriage, unless such testimony is supported by witnesses or accepted by the ward herself when she attains puberty.¹

Notes.

Tahtavi, Vol. 2, p. 41.

Baillie, Bk. 1, Chap. 4, p. 59 ; Zaidunil-Ambani, Vol. 1, p. 217.

Where a
man ac-
knowledges
a woman as
wife.

Art. 148. Where a man acknowledges a woman as wife and is not married to one of her relations within the prohibited degree,² or to four other wives, the marriage is proved provided that she is not already

¹ See Art. 495.

² See Arts., 21, 22, 23.

married, is not observing *Iddat*,¹ and gives her formal consent. The woman is entitled to maintenance and both parties are entitled to inherit from one another.

Notes.

Durrul-Mukhtâr, Vol. 3, p. 87.

Baillie, Bk. 5, Chap. 2, p. 409 ; Zaidunil-Ambani, Vol. 1, p. 218.

Where a Mahomedan man and woman lived in the same house as husband and wife, and a son was born to them, held, that Mahomedan law presumed a marriage between the parties and that there was no bar to such son sharing his inheritance equally as a son born in proved wedlock—*Mihir Ali v. Kureem-onisa Begum*, 2 Sel. Rep., S. D. A., 142 (1814).

Where a woman was free and not married to any other man although the actual celebration of her marriage may not have been proved with the man with whom she cohabited, yet he declared the son of such woman to be his, that son would certainly be accounted his legitimate offspring ; and should the mother of the child also confirm this declaration, she would be considered to all intents and purposes, the lawful wife of the person so declaring—*Qaim Ali v. Hingun*, 3 Sel. Rep., S. D. A. 203 (1822).

The Mahomedan law requires that an acknowledgment made by one man to another person that a particular specified woman was his wife, must be distinct and unmistakable—*Kedarnath Chuckerbutty v. Benjamin Donzelle*, 20 W. R., 352, *per* Phear, J. (1873).

According to Mahomedan law where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such marriage, the presumption is in favour of such marriage having taken place—*Khajah Hidayut Oollah v. Rai Jan Khanum*, 3 M. I. A., 295 (1844).

See *Mahomed Bauker Hossain v. Shurfoon-Nissa Begum*, 8 M. I. A., 136 (1860) ; *Fuzloonissa v. Nawabunnissa*, 2 Hay, 479 (1863) ; *Ashrufooddowlah v. Hyder Hossein*, 11 M. I. A., 94 (1866) ; Notes to Art. 333.

¹ See Art. 310.

Where a woman acknowledges a man as husband.

Art. 149. Where a woman in good health or in sickness, acknowledges a man as husband, the marriage is proved, provided that the man assents while she is still living ; in this case he is entitled to inherit from her but where he assents after her death, he is not entitled to inherit from her.

Notes.

Baillie, Bk. 5, Chap. 2, p. 409 ; Zaidunil-Ambani, Vol. 1, p. 219 ; Clavel, Vol. 1, p. 102.

BOOK II.

RECIPROCAL RIGHTS AND DUTIES OF HUSBAND AND WIFE.

(Arts. 150—216.)

CHAPTER I.

THE HUSBAND'S DUTIES TOWARDS THE WIFE.

(Arts. 150—159.)

Art. 150. The husband is obliged to treat his wife with kindness, to live on good terms with her, and to provide her with maintenance, which comprises food, raiment, and lodging.

Husband's
treatment of
wife.

Notes.

Bahrr-ul-Rayek, Vol. 3, p. 236 ; Radd-ul-Muhtâr, Vol. 2, p. 696.

Baillie Bk., 11, Chap. 1, p. 188 ; Zaidunil-Ambani, Vol. 1, p. 220.

See Section 488 of the Code of Criminal Procedure (Act V of 1898) ; *Abdur Rohoman v. Sakhina*, I. L. R., 5 Cal., 558 (1879) ; In the matter of the petition of *Din Mahomed*, I. L. R., 5 All., 226 (1882) ; In the matter of the petition of *Luddun Sahiba*, I. L. R., 8 Cal. 736 (1882).

See Notes to Art. 17.

Art. 151. It is praiseworthy for every husband to cohabit with his wife, but he is legally bound to do so at least once during the subsistence of the marriage.

His cohabit-
ation with
her.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 432.

Zaidunil-Ambani, Vol. 1, p. 221 ; Clavel, Vol. 1, p. 135

Equality of
treatment of
several
wives.

Art. 152. Where a man has several wives, he is bound to treat them with strict equality in all matters, but with regard to maintenance and partition of his nights among them, he is bound to treat them with as much equality as lies in his power.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 430-434.

Baillie, Bk. 1, Chap. 11, p. 188 ; Zaidunil-Ambani, Vol. 1, p. 221 ; Clavel, Vol. 1, p. 135.

See Sale's Koran, Chap. IV, p. 60.

Such equal-
ity of treat-
ment obli-
gatory under
all circum-
stances

Art. 153. These duties must be observed by the husband in respect of all his wives, without distinction between virgin and otherwise, between those long married and those married recently, or between the Muslim wife and the Christian or Jewish wife.

Notes.

Baillie, Bk. 1, Chap. 11, p. 188 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 4, pp. 66, 67 ; Zaidunil-Ambani, Vol. 1, p. 222.

Husband
must parti-
tion his
nights
equally
among his
wives

Art. 154. It is the husband's duty to pass alternately with each wife, the period of twenty-four hours, three days, or seven days, in whatever order of turn he himself shall fix and establish. Equality in the partition of his society, is only binding upon the husband during the night, unless he is occupied at night, in which case he must spend his time equally between his wives during the day.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 435.

Baillie, Bk. 1, Chap. 11, p. 189 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 6, p. 67 ; Zaidunil-Ambani, Vol. 1, p. 223.

He must n
favour one

Art. 155. The husband must not favour one wife more than another, nor remain with one beyond the

allotted period without the consent of the wife thereby deprived of his society, nor enter a wife's apartment if it is not her proper turn. In case of illness he can visit a wife out of turn, and if her illness is serious he can remain with her until she has recovered.

wife to the prejudice of another.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 435.

Baillie, Bk. 1, Chap. 11, p. 189 ; Zaidunil-Ambani, Vol. 1, p. 224.

Art. 156. A wife may abandon her rights in favour of a co-wife, but she is at liberty to recover them whenever she pleases.

One wife may abandon her rights in favour of a co-wife.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 434.

Baillie, Bk. 1, Chap. 11, p. 189 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 6, p. 67 ; Zaidunil-Ambani, Vol. 1, p. 224.

Art. 157. Whenever the husband goes on a journey, there shall be no question of partitioning his time. The husband can take with him whichever wife he chooses, but it is better to cast lots.

On a journey equal partition not necessary.

On his return, none of his other wives can require him to pass with them the same number of nights that he passed with the wife whom he took with him on his journey.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 434 ; Fatawa-i-Alamgiri, Vol. 2, p. 47.

Baillie, Bk. 1, Chap. 11, p. 190 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 2, p. 67 ; Zaidunil-Ambani, Vol. 1, p. 225.

See Sale's Koran, Chap. XXXIII, p. 348.

Art. 158. Where a husband is prevented through illness from leaving his own apartment, he can send for the wife whose turn it is to come to him.

Where the husband is ill.

If he falls sick in the apartment of one of his wives, and finds that he is not well enough to be removed to the dwelling of a co-wife, he may remain in the former apartment until he has recovered, provided he passes with the other wives as many days as he has passed while sick in the apartment of the first wife.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 435.

Baillie, Bk. 1, Chap. 11, p. 189 ; Zaidunil-Ambani, Vol. 1, p. 225.

Wife's
remedy in
case of
her hus-
band's
unjust
treatment.

Art. 159. Where a husband, after having settled the length of time to be spent with each wife, and fixed the order to be followed, acts unjustly to one of his wives and favours a co-wife by passing with her more time than he should, the Judge, except in the case of a journey, shall, at the request of the wife concerned, warn the husband to be more just in future.

Where the husband, in spite of the judicial admonition, again acts unjustly towards the wife, he shall be liable to a severe punishment, but not to imprisonment.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 433, 434.

Baillie, Bk. 1, Chap. 11, p. 189 ; Zaidunil-Ambani, Vol. 1, p. 226.

CHAPTER II.

THE HUSBAND'S DUTIES TOWARDS THE WIFE AS REGARDS MAINTENANCE.

(Arts. 160—205.)

SECTION I.—WIVES ENTITLED TO MAINTENANCE.

(Arts. 160—165.)

Art. 160. The husband though poor, sick, impotent, or too young for sexual intercourse, is obliged to provide his wife with maintenance, whether she is rich or poor, Muslim or otherwise, old or young, so long as she is able to fulfil the primary object of marriage. When the marriage is valid, this obligation commences from the conclusion of the marriage ceremony.

Wife entitled to maintenance when husband is too young to fulfil the duties of marriage.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 699, 700.

Baillie, Bk. 6, Chap. 1, p. 437 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 1, p. 140 ; Zaidunil-Ambani, Vol. 1, p. 227.

See Sale's Koran, Chap. II, p. 28 and Chap. LXV, p. 455.

See Notes to Art. 56.

Art. 161. Maintenance is due to the wife even when she is resident in her father's house, unless without valid reason she refuses to comply with the husband's request to reside in his house.

She is entitled to maintenance while residing in her father's house.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 701.

Baillie, Bk. 6, Chap. 1, p. 438 ; Zaidunil-Ambani, Vol. 1, pp. 228.

See *Kolashun Bibee v. Sheikh Didar Buksh*, 24 W. R. Cr., 44 (1875) ; Section 488 of the Code of Criminal Procedure (Act V of 1898).

Other cases where maintenance is due to the wife.

Art. 162. Maintenance is due to the wife who refuses to follow her husband on a journey, to a place which is three days' distance from that in which the marriage was contracted, or who, even after consummation of the marriage, refuses to surrender herself to her husband, because she has not received in full the prompt portion¹ of her dower, which according to the custom of the locality she is entitled to demand.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 699, 702.

Zaidu-nil-Ambani, Vol. 1, p. 229. Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 1, p. 141.

Maintenance of a sick wife.

Art. 163. Where a wife, after the marriage has been consummated, falls sick in either the husband's or her father's house, she is entitled to maintenance even when the illness renders her unfit for sexual intercourse, unless she has refused, without lawful reason, to surrender herself to her husband.

Where the wife falls sick in her husband's house and causes herself to be taken to her father's house, she is entitled to maintenance even when her husband claims her back, so long as it is found impossible to remove her; but if her removal is possible and she opposes it without a valid reason, she loses her right to maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 701, 703.

Baillie, Bk. 6, Chap. 1, pp. 349, 440; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 15, s. 1, p. 141; Zaidu-nil-Ambani, Vol. 1, p. 231.

Maintenance of a wife during her

Art. 164. The husband, when undergoing a term of imprisonment, is not released from the obligation to

¹ See Arts. 73, 104.

pay his wife's maintenance, even when imprisoned for a debt due to his wife which he is unable to pay.

husband's imprisonment.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 699, 700, 702, 703.

Baillie, Bk. 6, Chap. 1, p. 445 ; Zaidunil-Ambani, Vol. 1, p. 234.

Art. 165. The husband, who is in easy circumstances, must provide for the necessary maintenance of his wife's personal attendant. When the wife is taken to her husband's house with several servants, if the husband has the means, he is obliged to maintain them all.

Where husband is bound to maintain his wife's servants.

Where the husband has children, and one servant is not sufficient for their service, he must, if he is in easy circumstances, maintain two or more servants according to the needs of the children.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 710, 711.

Baillie, Bk. 6, Chap. 1, p. 441 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 1, p. 142 ; Zaidunil-Ambani, Vol. 1, p. 234 ; Clavel, Vol. 1, p. 151.

SECTION II.—WIVES NOT ENTITLED TO MAINTENANCE.

(Arts. 166—172.)

Art. 166. When the wife is too young for sexual intercourse, the husband may refuse her maintenance, unless he retains her in his house for the sake of company.

Maintenance not due to child wife.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 700.

Baillie, Bk. 6, Chap. 1, p. 437 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 1, p. 141. Zaidunil-Ambani, Vol. 1, p. 235.

A right to maintenance, depending upon the personal law of the individual, is a right capable of being enforced, and properly

forms the subject of a suit in a Civil Court—In the Matter of the petition of *Luddun Sahiba*, I. L. R., 8 Cal., 736 ; 11 C. L. R., 237 (1882).

Sick wife whose marriage is not consummated, is not entitled to maintenance.

Art. 167. When the wife is sick and her marriage has not been consummated, she is not entitled to maintenance if she cannot be removed to her husband's house.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 703.

Zaidu-nil-Ambani, Vol. 1, p. 236.

Wife on journey unaccompanied by husband, is not entitled to maintenance.

Art. 168. When the wife undertakes a journey, or goes on a pilgrimage unaccompanied by her husband, she is not entitled to maintenance for the time she is absent, even though she is accompanied on her journey by one of her relations within the prohibited degree.¹ When the husband undertakes a journey and takes his wife with him, he must defray all the costs of travelling and living.

When the wife undertakes the journey and takes her husband with her, he must defray her living but not of her travelling expenses.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 703 ; Fatawa-i-Alam-giri, Vol. 2, p. 562.

Zaidu-nil-Ambani, Vol. 1, p. 236 ; Clavel, Vol. 1, p. 143.

Maintenance of wife engaged in independent profession.

Art. 169. Where the wife exercises a profession necessitating her absence from her husband's house throughout the day, she is not entitled to maintenance if she leaves the house in spite of her husband's prohibition.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 702.

Zaidu-nil-Ambani, Vol. 1, p. 237.

¹ See Arts. 21, 22.

Art. 170. Maintenance is not due to a wife during the term of her imprisonment, though it be for a debt she cannot pay, unless it is the husband who has caused her arrest for debt due to himself.

Wife during her imprisonment is not entitled to maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 702.

Baillie, Bk. 6, Chap. 1, p. 439 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 1, p. 141 ; Zaidunil-Ambani, Vol. 1, p. 237.

Art. 171. Where a wife leaves her husband's house without his permission and without lawful reason, she is deemed rebellious, and not only loses all right to maintenance for the period during which she continues rebellious, but to all arrears of maintenance, and to the sums she has borrowed for maintenance without either a judicial decree, or an order from her husband.

Rebellious wife and her maintenance.

She is also held to be rebellious, when she forbids her husband to enter the house belonging to her but inhabited in common, unless she has asked him to take her to some other house and he has not done so.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 702.

Baillie, Bk. 6, Chap. 1, p. 438 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 1, p. 141. Zaidunil-Ambani, Vol. 1, p. 238.

According to Mahomedan law, a Mahomedan wife defying her husband and refusing to live with him is not entitled to maintenance—*A* (the wife) v. *B*. (the husband), I. L. R., 21 Bom., 77 (1896).

Art. 172. Where the marriage of a wife is radically void or has been consummated under a semblance of right, she can claim nothing from her husband on account of maintenance.

Maintenance of wife where marriage is void.

Where the Judge decrees that maintenance be paid to a wife, whose marriage is subsequently pronounced

invalid, the husband is entitled to a refund of the amount paid under the decree, but not to the amounts he has advanced voluntarily.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 699—701.

Baillie, Bk. 6, Chap. 1, p. 440 ; Zaidunil-Ambani, Vol. 1, p. 240.

SECTION III.—RULES REGULATING THE AMOUNT OF A WIFE'S MAINTENANCE.

(Arts. 179—180.)

Scale of
wife's main-
tenance.

Art. 173. When fixing the amount of maintenance, due regard shall be paid to the respective conditions of the husband and wife.

Where both are rich, the husband shall allow maintenance on a generous scale. Where they are both poor, the allowance shall be simple.

Where it is the husband who is poor, he must furnish as much as he is able out of the maintenance agreed upon, the balance constituting a debt to the wife, payable when the husband's position has improved.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 700.

Baillie, Bk. 6, Chap. 1, p. 442 ; Hamilton's Hedayah, Vol. 1, Bk. 1, Chap. 15, s. 1, p. 140 ; Zaidunil-Ambani, Vol. 1, p. 241.

See Sale's Koran, Chap. LXV, p. 455.

As to the alteration in wife's maintenance—see Section 489 of the Code of Criminal Procedure (Act V of 1898).

According to Mahomedan law until there has been an ascertainment of the rate at which maintenance is payable, no right to maintenance accrues to a wife on which she can found a suit—*Mahomed Museehooddin v. Clara Jane Museehooddin*, 2 N.-W. P., H. C. R., 173 (1870).

Art. 174. Maintenance may be fixed in kind or in money, according to the variations in the price of commodities in the locality. How maintenance shall be paid.

Where a judicial decree has fixed the amount of maintenance and the price of commodities thereafter rises, the wife is entitled to the additional amount, but where the price falls the husband is entitled to a reduction.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 706, 707.

Zaidu-nil-Ambani, Vol. 1, p. 243.

Art. 175. Payment of maintenance, whether in kind or in money, must be regulated by the husband's calling. The husband, who lives by his labour from day to day, shall pay daily and in advance the sum fixed for his wife's maintenance. The workman, receiving a weekly wage, shall pay weekly. The tradesman, who is paid by the month, shall pay monthly. Period at which maintenance is payable, must be husband's calling.

The cultivator who gathers his crops annually, shall pay annually. Nevertheless, the wife can insist on being paid daily, where the husband neglects to pay at the times fixed.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 705.

Zaidu-nil-Ambani, Vol. 1, p. 244.

Art. 176. During the marriage, the husband can undertake that he himself will furnish the necessary food for his wife. Where husband fails to maintain his

wife
properly.

Where he does not do so regularly, the Judge shall order the husband to appear, and after having satisfied himself that the complaint is well-founded, and that the husband does not as a rule supply sufficient food, he shall fix the amount of maintenance in accordance with the rules laid down in the preceding Article, and shall direct the husband to pay the amount to the wife, so that she may provide herself with her requirements.

If the husband refuses, in spite of the judicial order, to pay the amount, the Judge, if the wife demands it, may have him arrested. If he does not even then discharge the debt he owes his wife, the Judge may commit him to prison, and may also order the sale of his property which is not indispensable to him, and use the proceeds in payment of the wife's maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 704, 705; Fatawa-i-Alamgiri, Vol. 2, p. 567.

Baillie, Bk. 6, Ohap. 1, pp. 441, 443; Zaidunil-Ambani, Vol. 1, p. 245.

A Mahomedan wife is entitled to maintenance from the date of decree, where there is no agreement for maintenance before suit. She is also entitled to maintenance during the continuance of marriage. *Abdool Futteh v. Zabunnessa Khatun*, I. L. R., 6 Cal., 631, *per* Garth, C. J. (1881).

A Mahomedan husband was bound to pay the maintenance money to his wife according to the terms of the order of the Magistrate up to the date when he repudiated his wife—*Nepoor Aurut v. Jurai*, 10 B. L. R., App. 33 (1873).

See *Sidheswar Teor v. Gyanada Dasi*, I. L. R., 22 Cal., 291 (1894); *Shah Alin Ilyas v. Ulfat Bibi*, I. L. R., 19 All., 50 (1896).

Where hus-
band is in
straitened

Art. 177. Where the husband is known to be in straitened circumstances and does not possess the means

to pay for his wife's maintenance, the Judge shall not commit him to prison, nor shall he pronounce separation on this account. But after having fixed the amount of maintenance, he shall authorize the wife to buy food on credit or to borrow in her husband's name. circumstances.

The wife's relations on whom, in default of the husband, falls the obligation of providing her with maintenance, and those relations whose duty it is to maintain the children in the event of their father's death, are obliged to lend the wife what is necessary for her and her children's maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 12, 13.

Baillie, Bk. 6, Chap. 1, p. 443 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 1, p. 142 ; Zaidu-nil-Ambani, Vol. 1, p. 246 ; Clavel, Vol. 1, pp. 153, 157.

Art. 178. Where the amount of maintenance has been mutually agreed upon or fixed by a judicial decree, and the wife learns that her husband intends leaving her, or fears that he may absent himself, she can demand that a reliable surety be furnished for one month or more, according to the length of her husband's absence. Where wife may demand surety for maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 705, 706.

Zaidu-nil-Ambani, Vol. 1, p. 251.

Art. 179. Where the amount of maintenance has been fixed by judicial decree, it may be raised or lowered according to the changes in the position of husband and wife. Where maintenance may be modified.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 704, 713.

Zaidu-nil-Ambani, Vol. 1, p. 252 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 1, p. 142.

Where wife
is entitled to
wages from
the husband.

Art. 180. The wife can claim no wages from the husband for preparing his food, although legally she may not be bound to do this work. She is only entitled to wages when, by her husband's order, she cooks food or makes bread for sale.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 703.

Zaidu-nil-Ambani, Vol. 1, p. 253.

SECTION IV.—CLOTHING AND LODGING.

(Arts. 181—183.)

Husband
bound to
provide his
wife with
othing.

Art. 181. From the day a valid marriage is contracted, the wife is entitled to clothing. The husband is bound to provide her each year with two complete sets of clothing, at least one for summer and one for winter. Their quality is determined by the position of the husband and wife and in accordance with local custom.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 704—707.

Baillie, Bk. 6, Chap. 1, p. 448 ; Zaidu-nil-Ambani, Vol. 1, p. 253.

It may be
settled in
kind or
money.

Art. 182. The price of clothing, like that of food, can be made payable in kind or in money, and must be provided for in advance.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 704.

Zaidu-nil-Ambani, Vol. 1, p. 254.

Where wife
can claim a
new gar-
ment.

Art. 183. The wife cannot claim a new garment before the date fixed, unless the garment furnished has suffered by fair wear and tear. She is responsible for

the loss of a garment, and the husband is not bound to replace it until the expiry of the period fixed.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 710 ; Fatawa-i-Alam-giri, Vol. 2, p. 570.

Zaidu-nil-Ambani, Vol. 1, p. 255.

Art. 184. Where husband and wife are both wealthy, the husband must provide a separate house for his wife's residence ; where they are not wealthy, the husband must provide a separate apartment according to his means, which must possess the necessary conveniences and must not be isolated.

Where husband must provide his wife with a separate dwelling or apartment.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 718, 719, 720.

Zaidu-nil-Ambani, Vol. 1, p. 256.

See Sales' Koran, Chap. LXV, p. 455.

Art. 185. The husband cannot force his wife to provide lodging in her dwelling for any of his relations, or for his children by a former marriage, except those under the age of reason.

Husband cannot compel wife to provide lodging for his relations or children by another and *vice versa*.

On her side, the wife cannot give lodging to any of her relations or to her own children by a former marriage. In both cases, the consent of the other party is necessary.

Notes.

Tahtavi, Vol. 2, p. 266.

Baillie, Bk. 6, Chap. 1, p. 448 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 2, p. 185 ; Zaidu-nil-Ambani, Vol. 1, p. 257.

Art. 186. The residence of a near female relation of the husband in the house occupied by the wife, does

Where a wife can claim to be

removed to
another
dwelling.

not entitle the latter to claim a separate lodging elsewhere, except when she has cause to complain of the relation's familiar behaviour with her husband.

But the lodging of a co-wife in the same house gives the wife a right to demand a separate lodging elsewhere. The same rule applies where a co-wife or one of the husband's relations is lodged in the same apartment with the wife.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 718, 719.

Baillie, Bk. 4, Chap. 1, p. 449 ; Zaidunil-Ambani, Vol. 1, p. 258.

Where husband is bound to provide another dwelling or a companion for his wife.

Art. 187. Where the house possessed by the husband, contains no other inmates, and the wife suffers from loneliness, or where the husband neglects her by night, and remains with a co-wife while she has neither child nor servant to keep her company, the husband is bound to procure a companion for her, or else provide another dwelling for her in which she will have no cause to complain of solitude.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 720, 721.

Zaidunil-Ambani, Vol. 1, p. 259.

Articles a husband is bound to provide for his wife.

Art. 188. The husband is bound to supply his wife with a mattress, blankets and suitable furniture in accordance with his position in life. He is not even relieved from this obligation when the wife possesses such articles herself.

The husband must also provide the necessary household utensils, as well as the cosmetics and other articles, indispensable to the wife's toilette according to the custom of the country.

Notes.

Fatawa-i-Alamgiri, Vol. 2, pp. 517, 564; Radd-ul-Muhtâr, Vol. 2, p. 707; Bahrr-ul-Rayek, Vol. 4, p. 194.

Baillie, Bk. 6, Chap. 1, p. 448; Zaidunil-Ambani, Vol. 1, p. 260.

SECTION V.—THE WIFE'S MAINTENANCE WHEN
THE HUSBAND IS ABSENT.

(Arts. 189—196.)

Art. 189. Where a husband is absent, the wife may, for the purpose of maintenance, be authorized to dispose of such goods, or quantities of gold or silver, coined or uncoined, left by the husband, as will suffice to provide for the amount decreed in her favour.

Wife's maintenance where husband is absent and has left effects.

Where the husband has left behind deposits or debts, the wife may be authorized to use a part of them also, provided they are of such nature as may be used for maintenance, and the depositary and debtor respectively admit the deposit and debt and recognize the marriage. She may also be authorized to dispose of them where she can establish the deposit or debt and the Judge is cognisant of her marriage.

The Judge shall first make an order that payment of the maintenance be made from the sale of the household effects, and afterwards from the deposit and debts. He shall require good security from the wife for the amounts she receives, and shall make her declare on oath that her husband had advanced her no maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 722, 723.

Baillie, Bk. 6, Chap. 1, pp. 443, 445; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 2, pp. 144, 145; Vol. 2, Bk. 13, pp. 214, 215. Zaidunil-Ambani, Vol. 1, p. 260.

Where absent husband has left no effects.

Art. 190. Where the absent husband has not provided for any maintenance for his wife during his absence, and the wife proves her marriage with him, the Judge shall make an order for her maintenance, and authorize her to borrow or make purchases on credit in her absent husband's name, but he shall not dissolve the marriage even though the wife demands it.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 724.

Zaidu-nil-Ambani, Vol. 1. p. 265 ; Clavel, Vol. 1, p. 157.

Where husband advanced maintenance before he left.

Art. 191. Where the husband on his return, proves that he had paid his wife her maintenance in advance or where the wife, in default of proof, refuses to take the oath, the husband is entitled to recover the amount from his wife, or the surety.

Where the wife admits that she had received maintenance in advance from her husband, he shall be entitled to recover the amount from her alone.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 565.

Zaidu-nil-Ambani, Vol. 1, p. 266.

Where husband denies the marriage.

Art. 192. Where the husband, on his return, denies the fact of marriage, his sworn declaration shall be accepted, unless the wife produces proof to the contrary. Where the husband takes the oath, he can, in case of a deposit, sue his wife or the depositary for payment ; in the case of a debt, he can only sue the debtor, who, in turn, can proceed against the wife.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 565.

Zaidu-nil-Ambani, Vol. 1. p. 268 ; Clavel, Vol. 1, pp. 157, 160.

Art. 193. Where the husband, on his return, proves that the marriage was dissolved by repudiation¹, that the period of *Iddat*² had expired, and that consequently the wife was in no way entitled to the maintenance received by her in his absence, he may sue his wife for recovery of the amount recovered by her, but can not sue the depositary or debtor, unless the husband can establish that the depositary or the debtor was aware that the marriage had been dissolved.

Where he proves that the marriage was dissolved.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 565.

Zaidun-nil-Ambani, Vol. 1, p. 269 ; Clavel, Vol. 1, p. 160.

Art. 194. Where the depositary or debtor, directed by the Judge to provide maintenance for the wife of the absentee, claims to have paid the deposit or the debt to the wife for her maintenance, and she denies it, the depositary's declaration shall be accepted, but the debtor shall be required to adduce proof in support of such payment.

Where the Judge directs the wife to obtain maintenance from a debt or deposit.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 565.

Zaidun-nil-Ambani, Vol. 1, p. 270.

Art. 195. Where the husband leaves behind a deposit or goods that cannot be used for maintenance, neither the wife nor the Judge has the right to dispose of them in order to provide maintenance.

Where the husband has left movable and immovable property.

The immovable property belonging to the absent husband shall be leased out, and a part of the income expended for the wife's maintenance.

¹ See Art. 217.

² See Art. 310.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 565.

Baillie, Bk. 6, Chap. 1, p. 443 ; Zaidunil-Ambani, Vol. 1, p. 270.

Where it is lawful for a wife to take maintenance without a Judge's order.

Art. 196. In all cases where a Judge authorizes a wife to dispose of the property left by her absent husband, it is lawful for her to take from the property so left by him what is necessary for her maintenance without a judicial decree.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 565.

Baillie, Bk. 6, Chap. 1, p. 443 ; Zaidunil-Ambani, Vol. 1, p. 270.

SECTION VI.—DEBTS FOR MAINTENANCE.

(Arts. 197—205.)

Maintenance payable before debts.

Art. 197. The necessary debts contracted for the maintenance of a man, his wife, and his children, are payable before any other debt.

Notes.

Bahr-ul-Rayek, Vol. 8, p. 95.

Zaidunil-Ambani, Vol. 1, p. 271 ; Clavel, Vol. 1, p. 154.

Where maintenance is treated as a debt.

Art. 198. Maintenance does not constitute a debt until it is fixed by a judicial decree, or mutually agreed upon by the husband and wife.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 714.

Zaidunil-Ambani, Vol. 1, p. 273 ; Clavel, Vol. 1, p. 153.

According to Mahomedan law until there has been an ascertainment of the rate at which maintenance is payable, no right to maintenance accrues to a wife on which she can found

a suit—*Mahomed Museehooddin v. Clara Jane Museehooddin*, 2 N.-W. P., H. C. R., 173 (1870).

When a woman sues her husband for maintenance for a time antecedent to any order of the Judge or mutual agreement of the parties, the Judge is not to decree maintenance for the past.—*Abdool Futteh v. Zabunneessa Khatun* I. L. R., 6 Cal., 631, *per* Garth, C. J. (1881).

Art. 199. The debt for maintenance, judicially made payable to the wife, or settled by mutual agreement between husband and wife, is not subject to the law of limitation, and where the wife has not claimed the debt in full or in part at the dates fixed so long as she and her husband are living, she is entitled to the debt however much overdue.

Where maintenance is not subject to law of limitation.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 714.

Baillie, Bk. 6, Chap. 1, p. 443 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 1, p. 142 ; Zaidunil-Ambani, Vol. 1, p. 274.

Art. 200. Where a wife has expended or borrowed some amount on account of maintenance before the same has been fixed by judicial decree, or by mutual agreement, she is not entitled to recover the amount from her husband, whether present or absent, if she allows a full month to pass without claiming it.

Where wife cannot recover maintenance when a month has elapsed.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 714.

Zaidunil-Ambani, Vol. 1, p. 273 ; Clavel, Vol. 1, p. 154.

See the Indian Limitation Act (XV of 1877).

Art. 201. The death of either husband or wife extinguishes the latter's claim to arrears of maintenance

Where claim to arrears of maintenance

is extin-
guished.

awarded by judicial decree, or fixed by mutual agreement, and whatever she has borrowed without judicial authority.

The repudiation of the wife does not cause her to forfeit arrears of maintenance, unless it is proved that she, by her misconduct, has forced the husband to repudiate her.

Notes.

Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 15, s. 1, p. 143 ; Zaidunil-Ambani, Vol. 1, p. 275 ; Clavel, Vol. 1, p. 155.

Maintenance
judicially
decreed
remains a
debt against
the husband.

Art. 202. A debt for maintenance contracted by the wife in her husband's name in pursuance of a judicial decree, always constitutes a debt against the husband, and if he dies first, becomes chargeable against his estate.

Where a loan is effected by virtue of a judicial decree, the lender may sue the wife or her husband for payment. Where there is no judicial decree, the lender must proceed against the wife, who, if she is entitled to do so, may proceed against the husband.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 715.

Zaidunil-Ambani, Vol. 1, p. 257 ; Clavel, Vol. 1, p. 155.

Where
father or
husband
advances
main-
tenance.

Art. 203.—Advances for maintenance made to the wife by the husband or by his father, cannot be recovered in the event of repudiation¹ or of the death of husband or wife even when such advances have not been entirely consumed.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 716.

Baillie, Bk. 6, Chap. 1, p. 444 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 1, p. 203 ; Zaidunil-Ambani, Vol. 1, p. 276.

¹ See Art. 217.

Art. 204.—A wife cannot release her husband from paying arrears of maintenance, before the amount has either been fixed by a judicial decree, or has been settled by mutual agreement.

Where wife may release her husband from paying maintenance.

When the amount has been fixed, the wife can validly renounce in her husband's favour any arrears of maintenance, and where the maintenance is payable daily, weekly, monthly, or yearly, she can release him from the payment provided for one of these periods, if the period has already commenced.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 708.

Baillie, Bk. 6, Chap. 1, p. 446 ; Zaidunil-Ambani, Vol. 1, p. 277.

Art. 205. Where a wife is in debt to her husband, she cannot set off the amount of her debt against maintenance due to her, unless he consents to it.

Where maintenance may be set off against another debt

On the other hand, the husband, without his wife's consent, can set off a debt for maintenance against a debt she owes him.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 171.

Zaidunil-Ambani, Vol. 1, p. 278.

See Section 111 of the Code of Civil Procedure (Act XIV of 1882).

CHAPTER III.

MARITAL AUTHORITY.

(Arts. 206—211.)

Husband's authority in respect of wife's property, and wife's power of disposition of same.

Art. 206. A husband has no power over his wife's property. A wife can dispose of all her property without her husband's consent or sanction, nor does his marital authority empower him to restrain her from so doing.

She can receive the rents and income derived from her property, and can entrust the administration of her estate to a person other than the husband.

When a wife is of age and under no legal disability, all her contracts are valid without sanction of or ratification by her husband, father, paternal grandfather, or testamentary guardian.

Whatever fortune she may possess, the wife is not bound to contribute anything towards the household expenses.

Notes.

Bahrr-ul-Rayek, Vol. 3, p. 84 ; Radd-ul-Muhtâr, Vol. 2, p. 707.

Zaidu-nil-Ambani, Vol. 1, p. 279 ; Clavel, Vol. 1, p. 162.

Husband's rights over the wife after he has paid the prompt part of dower.

Art. 207.—After payment of the prompt¹ portion of the dower, the husband has the right :

(1) To forbid his wife to leave the house without his permission, respecting her right to visit her father and mother, and relations within the prohibited degrees^c at fixed periods.

¹ See Art. 73.

^c See Arts. 21 22.

(2) To forbid her to visit and mix with strange women, and to prevent her attending festivals and social gatherings, even with her relations within the prohibited degrees.

(3) To compel her to leave her father's house when she is not too young, and live among respectable neighbours in any quarter of the town in which the marriage was contracted, even if the contrary was stipulated when he married her.

(4) To prohibit her relations residing in the house, whether it is the husband's own property or only lent or leased to him.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 390, 719, 721.

Baillie, Bk. 6, Chap. 1, pp. 449, 450 ; Zaidunil-Ambani, Vol. 1, p. 280 ; Clavel, Vol. 1, p. 170.

See Notes to Art. 213.

Art. 208. After payment of the prompt portion¹ of the dower, a husband can remove his wife from the place in which the marriage was contracted, to a distance of less than three days' journey : but if the distance is a three days' journey, he cannot compel her to follow him even if he has paid the whole dower.

Where a husband may compel his wife to follow him on a journey.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 390, 391.

Baillie, Bk. 1, Chap. 7, p. 125 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 55. ; Zaidunil-Ambani, Vol. 1, p. 282.

Art. 209. When the wife commits a fault, or her conduct calls for reprimand, for which the law has prescribed no judicial penalty, the husband can punish her

Husband may punish wife in moderation, but must not use violence towards her.

¹ See Art. 73.

in moderation. He must not use violence towards her even under extreme provocation.

Notes.

Bahrr-ul-Rayek, Vol. 3, p. 84.

Baillie, Bk. 1, Chap. 11, p. 191 ; Zaidunil-Ambani, Vol. 1, p. 283 ; Clavel, Vol. 1, p. 164.

This conception of the mutual rights and obligations arising from marriage between the husband and wife, bears in all main features close similarity to the Roman law and other European systems, which are derived from that law ; and even regarding the power of correction the English law seems to resemble the Mahomedan, for even under the former “the old authorities say the husband may beat his wife ;” and if in modern times the rigour of the law has been mitigated, it is because in England, as in this country, the criminal law has stepped in to give to the wife personal security, which the matrimonial law does not. The Mahomedan law, on a question of what is legal cruelty between man and wife, would probably not differ materially from the English law—*Abdul Kadir v. Salima*, I. L. R., 8 All., 149, F. B., per Mahmood, J. (1886).

See Section 79 of the Indian Penal Code (Act XLV of 1860).

Judge may refer disputes between husband and wife to arbitration.

Art. 210. When the husband and wife disagree, the judge, before whom they bring their complaint, shall nominate two arbitrators of known respectability, one from the husband's family and one from the wife's, and refer to them the matters in dispute.

The arbitrators after hearing both sides shall endeavour by all possible means to bring about a reconciliation. If unsuccessful, the arbitrators may grant a repudiation when empowered to do so by both parties.

Notes.

Tafsvi-i-Ahmedi, pp. 280, 281.

Zaidunil-Ambani, Vol. 1, p. 284 ; Clavel, Vol. 1, p. 230.

See Sale's Koran, Chap. IV., p. 65.

Art. 211. If the wife complains of her husband's ill-treatment, and brings positive proof of his having used violence towards her, even though under great provocation, he is liable to punishment in accordance with the gravity of the offence.

Husband liable to punishment for using violence towards his wife.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 720.

Zaidu-nil-Ambani, Vol. 1, p. 284 ; Clavel, Vol. 1, p. 230.

See Indian Penal Code (Act XLV of 1860, Chap. XVI).

CHAPTER IV.

RIGHTS AND DUTIES OF THE WIFE.

(Arts. 212—218.)

Art. 212. A wife must be obedient to her husband in all that is permitted and legally ordained as a duty of marriage : she must remain in her husband's house and not quit it without his permission, after payment to her in full of the prompt portion¹ of the dower : she must not refuse her person to him unless legally or physically prevented : she must live a virtuous life and must carefully watch over his property and household : and without his permission she must give away no part of his belongings, except that which it is customary to give.

Wife's duties towards her husband, after he has paid prompt portion of dower.

Notes.

Fatawa-i-Alamgiri, Vol. 2, pp. 173, 175.

Zaidu-nil-Ambani, Vol. 1, p. 285.

Art. 213. Where the dower is divided into two parts, the wife, even after voluntary consummation of the marriage, can refuse her person to her husband and refuse to follow him to his house until he has paid in full the prompt portion¹ of the dower.

Wife may refuse her person until prompt dower is paid in full.

¹ See Art. 73.

If the amount of prompt dower has not been fixed, the wife is justified in refusing her person until payment of the amount, which in accordance with the custom of the country, would be accorded to a woman of her rank and station.

She can refuse her person where the payment of the full dower is arranged for by instalments, unless a stipulation to the contrary was made.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 388, 389.

Zaidu-nil-Ambani, Vol. 1, p. 286 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 54.

According to Imam Abu Hanifa, the founder of the Hanifa sect of Mussalmans, the wife even after consummation of marriage, can refuse her person to her husband until he has paid in full the prompt portion of the dower. In Egypt, Turkey and Arabia, this rule of law obtains among the Hanifites, and the British Courts in India administered it for nearly a century, as the following notes of their decisions would illustrate.

Dower must be considered as immediately demandable, unless the contrary was specified. The husband on the payment of the wife's dower due, can enforce her cohabitation with him, but not before—*Abdul Karim v. Fazilatun-nissa*, 5 Sel. Rep., S. D. A. 90 (1830) ; *Fukhro-nissa v. Shah Ally Ruzzah*, 6 Sel. Rep. S. D. A. 368 (1840).

See also Sel. Rep. 103, S. A. Bom. (1832) ; Morris' Sel. Dec., S. D. A., Bom., Part III, 41 (1853).

An action for restitution of conjugal rights will not lie unless the husband has paid the prompt portion of the dower to the wife, even after the consummation of marriage with her.—*Abdool Shukkoar, v. Raheemoon-nissa*, 6 N. W. P., H. C. R., 94, per Turner, J. (1874).

A Mahomedan wife can refuse herself to her husband till her dower, being prompt, has been satisfied. The circumstance that the husband and wife already cohabited since their marriage does not preclude the wife from refusing further cohabitation until the

portion of her dower payable to her has been paid—*Eidan v. Mazhar Husain*, I. L. R. 1 All., 483 (1877).

The views propounded by Abu Hanifa should be followed, and that a woman entitled to dower, that is prompt, may, even after consummation or valid retirement, deny her husband access to her person in order to enforce the man's pecuniary obligation to her—*Wilayat Husain v. Allah Rakhi*, I. L. R., 2 All., 831, *per* Straight, J. (1880).

When a Mahomedan wife's prompt portion of the dower was not paid, it was held that a suit for restitution of conjugal rights was not maintainable.—*Nasrat Husain v. Hamidan*. I. L. R., 4 All., 205 (1882).

See also *Jumeela v. Mulleeka*, W. R. Sup. Vol., 252 (1864); *Fatima Bibi v. Sadruddin*, 2 Bom. H. C. R., 291 (1865); *Buzloor Raheem v. Shumsoonnissa* 11 M. I. A., 551 (1867); *Tadiya v. Hasanebiyari*, 6 Mad. H. C. R., 9 (1870); *Khajooroonnissa v. Rayeesoonnissa*, L. R., 2 I. A., 235 (1870).

But in a suit for restitution of conjugal rights by a Mahomedan husband, the question of the wife's right to refuse cohabitation with her husband, after consummation of marriage, on the ground of non-payment of dower was argued in 1885 before the Full Bench of the Allahabad High Court, including Mahmood, J. Mahmood, J., disagreed with the views propounded by Imam Abu Hanifa, and agreeing with the views of the two disciples, Imam Abu Yusuf and Imam Mahomed, overruled the current of decisions on the subject, and the Full Bench adopted his opinion.

Mahmood, J., observed as follows :—

“The right of dower confers another right upon the Mahomedan wife, and the nature of this second right is described in the Hedayah in a passage on which the learned pleader for the respondent has relied for his contention. The passage is to be found in Grady's edition of Hamilton's Hedayah, at page 54; but as the translation is not sufficiently close, and is moreover interpolated with paraphrases, I translate the original text here literally, since much depends upon the exact meaning of the passage :—‘It is the wife's right that she may deny herself to her husband until she receives the dower, and she may prevent him from taking her away (that is, travelling with her), so that

her right in the return may be fixed in the same manner as that of the husband in the object of the return and become like sale. And it is not for the husband that he may prevent her from travelling or going out of his house and visiting her friends until he has paid the whole exigible dower, because the right of restraint is for securing fulfilment (of his right) to the rightful person, and he has not the right to securing fulfilment before rendering fulfilment (himself); and if the whole dower is deferred, it is not for her to deny herself because of her having dropped her right by deferring it, as in sale. And in this matter Abu Yusuf holds the contrary opinion. And if the husband has retired with her the same would be the answer according to Abu Hanifa: but the two disciples have said she has not the right to deny herself, and the difference of opinion subsists where there is retirement with her consent; but if she was forced or an infant or insane, her right of denying herself does not drop according to the unanimous opinion of our Doctors.'

Another passage to be found in the *Durrul-Mukhtâr* has also been cited by the learned pleader for the respondent, and I translate it here before considering the exact effect of these authorities upon the present case:—'It is the wife's right to prevent the husband from connubial intercourse, and that which is implied therein, and from journeying with her, even though after connubial intercourse and retirement to which she has consented, because all connubial intercourse has been contracted with her, and the rendering of some does not imperatively require the rendering of the rest. This right is for the purpose of obtaining what has been stated as prompt dower, whether wholly or partly, I wish to quote a passage from the celebrated *Fatawa Qazî Khan*, a text book as high in authority as the *Durrul-Mukhtâr*:—'A wife, having surrendered herself to her husband before the fulfilment (*i.e.*, payment) of dower, subsequently denies herself (to him) for securing fulfilment of the dower. She has this right in the opinion of Abu Hanifa; but Abu Yusuf and Imam Mahomed maintain that she has not the right of prohibiting him from connubial intercourse, and doubts have arisen in regard to their opinions as to the power of preventing her from journeying. According to Abul Qasim Assaffar, it is her right that she may prevent him from taking her on a journey.'

Imam Abu Hanifa and his two disciples are known in the Hanifa school of Mahomedan Law as 'the three Masters,' and I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of the two will prevail against the opinion of the third. Now, bearing this in mind, it is clear that the two disciples of Imam Abu Hanifa, regarding the surrender of the wife to her husband as bearing analogy to delivery of goods in sale, held that the lien of the wife for her dower, as a plea for resisting cohabitation, ceased to exist after consummation. According to the ordinary rule of interpreting Mahomedan Law, I adopt the opinion of the two disciples as representing the majority of 'the three Masters,' and hold that, after consummation of marriage, non-payment of dower, even though exigible, cannot be pleaded in defence of an action for restitution of conjugal rights; the rule so laid down having, of course, no effect upon the right of the wife to claim her dower in a separate action."—*Abdul Kadir v. Salima*, I. L. R., 8 All., 149, F. B., (1886).

The Mahomedan matrimonial contract involves separate and independant contract by the husband and wife. The wife is by contract bound to submit herself to her husband and he is to pay the prompt or other dower according to the contract, or if no sum agreed on, according to the provision of the law. Each has a separate remedy against the other for non-performance of the contract—*Kunhi v. Moidin*, I. L. R., 11 Mad., 327 (1888).

Where a Mahomedan husband brought a suit for restitution of conjugal rights against his wife, and the latter urged that the husband was not entitled to succeed on the ground that he had not paid the exigible portion of the dower due to her, held, that there being a difference of opinion between Abu Hanifa and Mahomed, upon the question whether a woman can refuse herself to her husband after consummation upon the ground of non-payment of prompt dower, the former answering the question in the affirmative and the latter in the negative, the practice of later Jurisconsults has been to follow the two disciples, though they agree with Abu Hanifa upon the question of the wife's right to refuse to accompany the husband on a journey—*Hamidunnessa Bibi v. Zohiruddin Sheikh*, I. L. R., 17 Cal., 670 (1890).

In a suit for restitution of conjugal rights, the question of the jurisdiction of the Court was discussed—*Aklemannessa v. Mahomed Hatem*, I. L. R., 31 Cal., 849 (1904).

To a husband's suit for restitution of conjugal rights, the wife pleaded non-payment of dower. To this the husband pleaded consummation of the marriage, held, that after consummation of marriage, non-payment of dower cannot be pleaded in defence of an action for restitution of conjugal rights—*Bai Hansa v. Abdulla*, I. L. R., 30 Bom., 122, *per Jenkins*, C. J. (1905).

As to decree for the recovery of wives, see Section 259, and for restitution of conjugal rights, see Section 260 of the Civil Procedure Code (Act XIV of 1882). See also Section 11 of the Code of Civil Procedure (Act XIV of 1882).

The period of limitation in a suit for the recovery of a wife or for the restitution of conjugal rights by a Mahomedan, is prescribed by Articles 34 and 35 of the Schedule II of the Indian Limitation Act (XV of 1877), and a suit must be brought within two years from the time when the possession of the wife was demanded and refused or when restitution was demanded and refused by the husband or wife, being of full age and sound mind.

Where wife may leave her husband's house without his permission.

Art. 214. When the wife has not received her prompt dower¹ in full, after having laid claim to it, she is free to leave her husband's house without his permission and without thereby rendering herself rebellious or losing her right to maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 389, 708.

Zaidu-nil-Ambani, Vol. 1, p. 287 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 3, p. 54 ;

Wife entitled to visit her relations.

Art. 215. When her father and mother are unable to come and see her at her own house, a wife is entitled to visit them once a week, and to visit other male relations, who are within the prohibited degree² once

¹ See Art. 73.

² See Arts. 21, 22.

a year. She cannot pass the night at any of their houses except by the express permission of her husband.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 721.

Zaidu-nil-Ambani, Vol. 1, p. 288.

Art. 216. A wife, whose father is suffering from a protracted illness and has no one to tend him, without her husband's consent can visit and remain with him in order to afford him the necessary attention, even if he be a non-Muslim.

Wife may attend her sick father without husband's consent.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 721.

Baillie, Bk. 1, Chap. 2, p. 191 ; Zaidu-nil-Ambani, Vol. 1, p. 288.

BOOK III.

DISSOLUTION OF MARRIAGE.

(Arts. 217—331.)

CHAPTER 1.

DIVORCE (TALAK.)

(Arts. 217—272.)

SECTION I.—POWER TO PRONOUNCE REPUDIATION : WIVES WHO CAN BE REPUDIATED : NUMBER OF REPUDIATIONS.

(Arts. 217—225.)

Where
husband
may dissolve
marriage by
repudiation.

Art. 217. The husband alone has the right of dissolving marriage by repudiation.

Every adult husband of sound mind can pronounce a valid repudiation, even when he is legally incompetent, as a spend-thrift or is suffering from any disease which is not mental.

A repudiation is valid even if pronounced under compulsion or in jest.

Notes.

Aieni, p. 110 ; Durrul-Mukhtâr, Vol. 2, p. 133 ; Fatawa-i-Alamgiri, Vol. 2, p. 55 ; Bahrr-ul-Rayek, Vol. 3, p. 263 ; Radd-ul-Muhtâr, Vol. 2, p. 461.

Baillie, Bk. 3, Chap. 1, p. 208 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 1, p. 75 ; Zaidul-Ambani, Vol. 1, p. 288.

A repudiation is the mere arbitrary act of a Mahomedan husband, who may repudiate his wife at his own pleasure, with or without cause ; but if he adopts that course, he is liable to pay her dowry—*Buzul-ul-Raheem v. Luteefutoon-nissa*, 8 M. I. A., 379 (1861).

According to Mahomedan law, a repudiation of one acting upon compulsion from threats is effective—*Ibrahim Mulla v. Enayetur Ruhman*, 4 B. L. R. 13 (1869).

Although the ordinary Mahomedan law of repudiation does not exist in respect of marriages by the *Mutah* form, and they are dissolved *ipso facto* by the expiry of the term for which they may have been contracted, still there is another way of terminating the marriage by the giving away of the unexpired portion of the term for which the marriage was contracted—*Mahomed Abed Ali Kumar Kadar v. Ludden Saheba*, I. L. R., 14 Cal. 276 (1887).

Art. 218. A repudiation is valid, even if pronounced by a husband, while he is intoxicated of his own free will from drinking a forbidden liquor.

Where repudiation pronounced during intoxication is valid.

When the husband becomes intoxicated under compulsion or from necessity, the repudiation he pronounces while in that state has no effect.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 459 ; Fatawa-i-Alamgiri, Vol. 2, p. 55.

Baillie, Bk. 3, Chap. 1, p. 209 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 1, p. 76 ; Zaidunil-Ambani, Vol. 1, p. 296 ; Clavel, Vol. 1, p. 178.

Art. 219. A dumb man can validly repudiate by signs which are intelligible.

Repudiation by dumb man.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 55.

Baillie, Bk. 3, Chap. 1, p. 210 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 1, p. 76 ; Zaidunil-Ambani, Vol. 1, p. 300.

Where husband is incapable of pronouncing a valid repudiation.

Art. 220. When the husband is asleep and is afflicted with madness or imbecility, or has lost the use of his reason through old age, illness, or a sudden accident, he is incapable of pronouncing a valid repudiation. A repudiation pronounced by a husband while in any of these conditions has no effect. Where the husband makes a repudiation subject to a condition which is realised after he has lost his intellectual faculties, the repudiation shall produce all its effects.

Notes.

Bahrr-ul-Rayek, Vol. 3, p. 268 ; Durrul-Mukhtâr, Vol. 2, p. 19 ; Fatawa-i-Alamgiri, Vol. 2, p. 55.

Baillie, Bk : 3, Chap. 1, p. 209 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 1, p. 75 ; Zaidunil-Ambani, Vol. 1, p. 298.

Minor's father or minor himself cannot repudiate the minor wife.

Art. 221. The father cannot validly repudiate the wife of his minor son, nor can the minor pronounce a valid repudiation.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 55 ; Durrul-Mukhtâr, Vol. 2, p. 19 ; Radd-ul-Muhtâr, Vol. 2, p. 452.

Zaidunil-Ambani, Vol. 1, p. 299.

Repudiation may be expressed verbally or in writing.

Art. 222. A repudiation can be expressed verbally or in writing.

A husband can delegate the power of repudiation to a third party, or send a letter of repudiation to his wife, or authorize her to pronounce her own repudiation, or direct her as his agent to repudiate his other wives.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 452, 464, 514, 515, 516 ; Fatawa-i-Alamgiri, Vol. 2, p. 90.

Baillie, Bk. 3, Chap. 2, p. 212 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 3, pp. 92, 257 ; Zaidunil-Ambani, Vol. 1, p. 300.

Where a Mahomedan husband signed an instrument of repudiation in the presence of his wife's father, but not in the presence of the wife herself, held, that the act of triple repudiation contained in the instrument effected a valid repudiation according to Mahomedan law—*Waj Bibee v. Azmut Ali*, 8 W. R., 23, *per* Phear, J. (1867).

A writing is not necessary to the legal validity of a repudiation under Mahomedan law, but where a repudiation takes place between persons of rank and property, and where valuable rights depend upon the marriage and are affected by the repudiation, the parties, for their own security, should have some document which might afford satisfactory evidence of what they had done—*Gouhur Ali Khan v. Ahmed Khan*, 20 W. R., 214, P. C. (1873).

According to Mahomedan law, the husband may give his wife an option to repudiate herself, and if she avails of it, the repudiation is binding on him, and a discretion to repudiate, when attached to a condition, need not be limited to any particular period, but may be absolute as regards time—*Ashruf Ali v. Ashad Ali*, 16 W. R., 260 (1871).

Where a Mahomedan husband entered into an agreement, authorizing his wife to repudiate herself and take another husband, if he married another wife without her consent, held, such an agreement was valid according to Mahomedan law—*Badarannissa Bibi v. Mafiattala*, 7 B. L. R., 442 (1871).

Mahomedan law provides for the delegation of the power of repudiation by the husband to the wife on certain occasions. An agreement entered into before marriage between the parties able to contract, under which the wife consented to marry on condition that, under certain specified contingencies, all of a reasonable nature, her future husband should permit her to repudiate herself under the form prescribed by Mahomedan law is valid—*Hamidoollah v. Faizunnissa*, 1. L. R., 8 Cal., 327 (1882).

Where a condition in the Kabinnamah authorized the wife to repudiate herself on the failure of the husband to deliver certain ornaments on demand, and on his failure to do so, the wife pronounced repudiation upon herself, held, that according to Mahomedan law, she was competent to rely upon the condition, which was imposed by her and accepted by the husband and to pronounce a repudiation—*Nuruddin v. Chenuri*, 3 Cal. L. J., 49 (1905).

Cases where
a wife may
be repu-
diated.

Art. 223. Repudiation can be validly directed against any woman who is married, or who is observing *Iddat*, consequent upon a revocable repudiation or an irrevocable repudiation not final, or who is observing *Iddat* consequent upon a separation amounting to repudiation, such as the separation pronounced in consequence of a vow of continence, the separation pronounced in consequence of the husband's impotency, or a separation brought about by the refusal of one of the parties to embrace the religion of Islam.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 452, 513 ; Bahrr-ul-Rayek, Vol. 3, p. 255.

Baillie, Bk. 3, Chap. 1, p. 205 ; Zaidunil-Ambani, Vol. 1, p. 302.

Number of
repudiations.

Art. 224. Every woman can be repudiated three times. When the marriage has been consummated, these repudiations can be pronounced on three separate occasions or by one single formula : when the marriage has not been consummated, these repudiations can only be pronounced by one single formula.

When the marriage is valid, the wife repudiated three times cannot be taken back by her first husband, until she has been validly married to another man and has been repudiated by him, or until she has become a widow after actual consummation of the marriage with the second husband, and has completed the period of *Iddat* consequent either upon repudiation or widowhood.¹

Notes.

Durr-ul-Mukhtâr, Vol. 2, p. 19 ; Bahrr-ul-Rayek, Vol. 2, pp. 314, 315 ; Vol. 4, p. 61.

Baillie, Bk. 3, Chap. 1, p. 206 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 1, p. 76 ; Zaidunil-Ambani, Vol. 1, p. 308 ; Clavel, Vol. 1, p. 182.

¹ See Arts. 28, 237, 248.

According to existing usage, a repudiation by Talak is not complete and irrevocable by a single declaration of the husband. But there is one condition, in whichever way it takes place, namely, that the wife is to remain in seclusion for a period of some months after the repudiation, in order that it may be seen whether she is pregnant by her husband, and she is entitled to a sum of money from her husband, for her maintenance during the period of *Iddat*—*Buzul-ul-Raheem v. Luteefutoon-nissa*, 8 M. I. A. 379, (1861).

No special expressions are necessary under Mahomedan law to constitute a valid repudiation. It is sufficient if they clearly indicate an intention to put an end to the relation of husband and wife, nor is it necessary that the expression should be repeated thrice except when the repudiation is final and irrevocable—*Ibrahim v. Syed Bibi*, I. L. R. 12 Mad., 63, (1888).

Where a Mahomedan pronounced only once the repudiation of his wife in the presence of the Kazi but in her absence, and executed an instrument of repudiation, held, that according to Mahomedan law, having regard to the words, writing, intention and conduct of the husband, it was a valid repudiation—*Sarabai v. Rabiabai*, I. L. R., 30 Bom. 537, *per* Bachelor, J. (1905).

See *Sherif Saib v. Usanabibi*, 6 Mad. H. C. R., 452 (1871).

Art. 225. In order to render a repudiation valid the use of special words is necessary. The formulas for a repudiation are either express or implied.

Use of special words necessary. Express or implied formulas.

An express formula is that which contains the letters of the word *Talak* or words which generally convey the meaning of the word *Talak* or repudiation, or that which signifies the dissolution of marriage in any other language.

An express formula includes repudiation in writing, the signs of a dumb man, and the signs made with the fingers accompanied by the pronouncement of the word *Talak*:

Provided they are directed against the wife to be repudiated, all these expressions effect repudiation by

their mere pronouncement, and the question of the husband's intention does not arise.

An implied formula is that which is expressed otherwise than in words to signify repudiation. A repudiation pronounced by the latter depends for its validity upon the husband's intention or upon the circumstances under which it was pronounced.

Notes.

Bahrr-ul-Rayek, Vol. 3, pp. 252, 272; Hedaya, Vol. 2, p. 339; Radd-ul-Muhtâr, Vol. 2, p. 465; Durrul-Mukhtâr, Vol. 2, pp. 21, 23.

Baillie, Bk. 3, Chap. 2, p. 212; Zaidunil-Ambani, Vol. 1, p. 30.

Where a Mahomedan pronounced the word *Talak* three times without addressing it to any person in an assembly where he and certain others including his wife's relations were present, held, that the pronouncing the word *Talak* under the circumstances did not constitute a valid repudiation according to Mahomedan law.—*Furzund Hossein v. Janu Bibee*, I. L. R., 4 Cal., 588 (1878).

Where a Mahomedan used certain expressions to his wife, when she was leaving his house, and intended not to receive her back as his wife, held, that it constituted a repudiation according to Mahomedan law.—*Hamid Ali v. Imtiazan*, I. L. R., 2 All., 71 (1878).

According to Mahomedan law it is of vital importance to know what are the exact words used by a Mahomedan husband when he is alleged to repudiate his wife.—*Sakina Khanum v. Laddan Saheba*, 2 Cal. L. J. 218 (1902).

As to a Mahomedan wife's costs of litigation against her husband—*A. (the wife) v. B. (the husband)*, I. L. R., 21 Bom., 77 (1896) See also *Mayhew v. Mayhew* I. L. R., 19 Bom., 293 (1894).

See *Noorunisa Begum v. Syed Mohsin Alee*, 7 Sel. Rep. S. D. A., 46 (1841); *Jaun Beebee v. Beparee*, 3 W. R. 93 (1865); In re *Kasam Purbhai*, 8 Bom. H. C. R., Cr. 95 (1871); In re *Abdul Ali Ishmailji*, I. L. R., 7 Bom., 180 (1883).

SECTION II —DIFFERENT KINDS OF REPUDIATION (*Raji & Bain*).

(Arts. 226—250.)

Art. 226. There are two kinds of repudiation, revocable (*Raji*) and irrevocable (*Bain*). Different kinds of repudiation.

Irrevocable repudiation, is sub-divided into imperfect repudiation and perfect or final repudiation.

It is imperfect, when it has been only pronounced once or twice.

It is perfect or final, when it has been pronounced three times.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 456, 487, 489 ; Tahtavi, Vol. 2, p. 101.

Baillie, Bk. 3, Chap. 1, p. 205 ; Zaidunil-Ambani, Vol. 1, p. 310.

IREVOCABLE REPUDIATION (*raji*), AND ITS LEGAL EFFECTS.

(Arts. 227—236.)

Art. 227. Repudiation is revocable, when the husband addressing his wife, with whom he has consummated marriage uses an express formula, unaccompanied by an offer of compensation or by the number *three* expressed either formally or with a show of the fingers. Thus, if the husband, addressing the wife uses the expression “Thou art repudiated ; I have repudiated thee,” the wife only incurs one revocable repudiation, even though the husband intended to convey one, two or three irrevocable repudiations. When a repudiation is revocable.

Notes.

Bahrr-ul-Rayek, Vol. 3, pp. 275, 310 ; Radd-ul-Muhtâr, Vol. 2, pp. 465, 466, 467.

Baillie, Bk. 3, Chap. 2, p. 212 ; Zaidunil-Ambani, Vol. 1, p. 311 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 2, p. 76.

Expressions involving a revocable repudiation.

Art. 228. The expressions “Repudiation is binding on me,” “Repudiation is incumbent on me” involve one revocable repudiation, even when the husband should intend two. If the husband declares that, when using one of these two expressions, he intended a final repudiation, his declaration shall be accepted.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 19.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 2, pp. 76, 77 ; Zaidunil-Ambani, Vol. 1, p. 317.

Expressions involving a repudiation by implication.

Art. 229. The following expressions “Count thy lunar periods,” “Remain continent,” “Thou art single” will involve one revocable repudiation by implication. When the husband, without being provoked, uses one of these expressions, the repudiation depends upon his intention. If, while pronouncing it, he intended repudiation, the wife incurs one revocable repudiation, even if the husband desired two or three repudiations.

When, in a moment of anger, or in response to a request for repudiation made by the wife, the husband pronounces one of the above expressions, one revocable repudiation by implication is incurred, without the question of the husband's intention to repudiate arising.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 69 ; Radd-ul-Muhtâr, Vol. 2, pp. 502, 503, 504, 505.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 2, p. 84 ; Zaidunil-Ambani, Vol. 1, p. 318 ; Clavel, Vol. 1, p. 185.

Marriage not dissolved until *Iddat* is completed.

Art. 230. A revocable repudiation, whether pronounced once or twice, does not dissolve the marriage tie, and does not take away from the husband his marital

authority over the wife, before completion of the period of *Iddat*, incumbent upon her as a result of the repudiation.

The marriage still subsists during the *Iddat*, except that the wife withdraws to her own apartment or hangs a curtain between herself and her husband, who is always bound to provide for her maintenance during the period of retirement.

The husband is allowed access to the wife without her permission, and can treat her as his wife, but this treatment would constitute a return.

Should either husband or wife die¹ during the period of *Iddat*, the survivor inherits from the deceased, whether the wife was repudiated while her husband was in good health or during his last illness, and whether she asked to be repudiated, or was repudiated against her wish.

Notes.

Fath-ul-Kadir, Vol. 2, p. 242; Radd-ul-Muhtâr, Vol. 2, pp. 576, 582, 650, 672, 673, 674, 726; Fatawa-i-Alamgiri, Vol. 2, pp. 122, 126; Fatawa-i-Sirajiah, p. 259.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 6, p. 107; Zaidunil-Ambani, Vol. 1, p. 320.

Art. 231. Any husband, who has once, or even twice, revocably repudiated his wife with whom he has consummated marriage, has the right to take her back during the *Iddat*, even after his renunciation of this right, without the necessity of another marriage or of a new settlement of dower.

Where husband can take his wife back during *Iddat*.

The right to take her back can be exercised even without the wife's consent and without the husband being obliged to give her notice. The husband only loses this right at the expiry of the period of her *Iddat*.

¹ See Art. 246.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 574, 575, 576 ; Bahrr-ul-Rayek, Vol. 4, p. 54.

Baillie, Bk. 3, Chap. 6, pp. 285, 289 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 6, p. 133 ; Zaidu-nil-Ambani, Vol. 1, p. 322.

If a husband repudiates his wife three times during that period which extends over three months, the repudiation is irrevocable ; but if one sentence of repudiation be pronounced, the husband might take the wife back at any time before the expiration of her *Iddat* or term of probation ; but after that term has passed without the husband exercising the power of return on his repudiated wife, the marriage no longer remains—*Syed Mozuffur Ali v. Kumurunnissa Bibee*, W. R. Sup. Vol. 32, *per* Kemp, J., (1864).

How the
right of re-
turn is to be
exercised.

Art. 232. The husband can validly exercise the right of return verbally by saying to his wife, if she is present, " I have taken thee back " or, if she is absent, " I have taken back my wife."

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 574, 575.

Baillie, Bk. 3, Chap. 6, p. 286 ; Zaidu-nil-Ambani, Vol. 1, p. 323.

What consti-
tutes a valid
return.

Art. 233. To be valid, the return must be immediate and unconditional. Any return fixed for a future date or subject to a condition, has no effect.

Notes.

Bahrr-ul-Rayek, Vol. 4, p. 54.

Baillie, Bk. 3, Chap. 6, p. 287 ; Zaidu-nil-Ambani, Vol. 1, p. 324.

Husband
must inform
wife that he
has exercised
right of re-
turn.

Art. 234. Although a return to the wife is valid when made verbally without witnesses and without the wife's knowledge, the husband must inform his wife of it, and, as also in the case of return by cohabitation, he must declare before trustworthy witnesses that he has taken back his wife.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 576 ; Tahtavi, Vol. 2, p. 171.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 6, p. 104 ; Zaidunil-Ambani, Vol. 1, p. 325.

Art. 235. The husband's right of return together with his marital authority¹ over his repudiated wife, ceases at the close of the tenth day from the commencement of her menstrual purgation on the termination of her courses.

When the right of return ceases

Notes.

Bahrr-ul-Rayek, Vol. 4, p. 57.

Baillie, Bk. 3, Chap. 6, p. 288 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 6, p. 105 ; Zaidunil-Ambani, Vol. 1, p. 325.

The husband might take the wife back at any time before the expiration of her period of *Iddat* ; but after that period has passed without the husband exercising the power of return on his repudiated wife, the marriage ceases—*Syed Muzuffur Ali v. Kumurunnisa*, W. R., Sup. Vol. 32, per Kemp, J. (1864).

See *Ibrahim v. Syed Bibi*, I. L. R., 12 Mad., 63 (1888).

Art. 236. When a dispute arises between the married parties, the wife claiming that she has had her courses three times and that the period of her *Iddat* has expired, and the husband maintaining that the period has not expired, and that he has the right to demand her return to him, the wife's word shall be accepted and she shall recover her liberty if her claim is justified by the length of time elapsed since the day of her repudiation.

Where there is a dispute as to expiration of *Iddat*.

When the *Iddat*² is counted by the number of courses, the shortest period of *Iddat* for a wife is sixty days.

¹ See Art. 206.

² See Art. 310.

Notes.

Durrul-Mukhtâr, Vol. 2, p. 44.

Baillie, Bk. 3, Chap. 6, p. 287; Zaidunil-Ambani, Vol. 1, p. 328.

Where the taking back of wife does not annul previous repudiations.

Art. 237. The taking back of a repudiated wife does not annul the previous repudiations, and if, taken back after two revocable repudiations, the wife is repudiated a third time, the marriage ties are entirely dissolved, the husband loses his authority and cannot marry the woman, unless after marrying a second husband, she has been separated from him or becomes a widow after consummation of the marriage, and is free from *Iddat*.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 52.

Zaidunil-Ambani, Vol. 1, p. 329.

Where deferred part of dower is payable after a revocable repudiation.

Art. 238. A revocable repudiation, after completion of the wife's period of *Iddat*, renders payable the deferred part¹ of the dower which is still due from the husband.

The repudiated wife is entitled to claim its payment, unless it was arranged to pay the dower by instalments, in which case, the wife can only claim it at the fixed dates.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 576.

Zaidunil-Ambani, Vol. 1, p. 330.

See *Buzul-ul-Raheem v. Luteefutnon-Nissa*, 8 M. I. A., 379 (1861); Notes to Art. 73.

¹ See Art. 73.

II

IRREVOCABLE REPUDIATION (*Bain*), PERFECT OR IMPERFECT.

(Arts. 239—250.)

Art. 239. Repudiation is irrevocable when a husband, addressing his wife with whom he has consummated marriage, makes use of an express formula accompanied by the number *three* expressed either formally or with a show of the fingers when pronouncing the word *Talak*.

When repudiation is irrevocable.

When the husband says to her, "Thou art repudiated absolutely," she incurs only one irrevocable repudiation, even though he denies any intention of repudiation. Should he declare that he intended three repudiations, his declaration must be accepted.

Should he say to her, "Thou art repudiated thrice," or should he make signs to her with three fingers, while saying "Thou art repudiated as many times as these fingers," the wife incurs a perfect or final repudiation.

It is the same if he uses the expressions "Thou art repudiated with the maximum of repudiations," or "Thou art repudiated many times, or a thousand times."

Notes.

Bahrr-ul-Rayek, Vol. 3, pp. 275, 309, 310 ; Tahtavi, Vol. 2, p. 125 ; Radd-ul-Muhtâr, Vol. 2, pp. 487, 489 ; Fatawa-i-Alamgiri, Vol. 2, p. 56.

Zaidu-nil-Ambani, Vol. 1, p. 331.

Art. 240. Every repudiation of a wife with whom marriage is not consummated is irrevocable.

Every repudiation made before consummation of marriage, is irrevocable.

Thus, if the husband repudiates his wife with whom he has had no actual or presumed consummation of

marriage, such repudiation is irrevocable and *Iddat*¹ is not incumbent upon the wife. It is the same if he repudiates her after a valid retirement,² but in that case *Iddat* is incumbent on her.

If he thrice repudiates her by using one express formula, she is finally repudiated, but should he pronounce the three repudiations against her one after the other, the first alone produces its effect, the two others having no effect on her.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 370, 492, 493.

Zaidu-nil-Ambani, Vol. 1, p. 332.

Where a
revocable
repudiation
becomes
irrevocable

Art. 241. When a husband who has pronounced against his wife one or two revocable repudiations, allows the whole period of her *Iddat* to expire without taking her back, the repudiation assumes the character of an irrevocable repudiation, and the wife acquires full liberty, and the husband can no longer exercise the right of return.

Notes

Hidaya, Vol. 2, pp. 374, 375; Jami-ur-Romuz, p. 235.

Zaidu-nil-Ambani, Vol. 1, p. 334.

See *Mozuffur Ali v. Kumurunissa*, W. R., Sup. Vol. 32, per Kemp, J. (1864).

Repudiation
with com-
pensation is
irrevocable.

Art. 242. When a husband repudiates his wife, and offers to pay her compensation, and she immediately accepts it, the repudiation is irrevocable.

Notes.

Jami-ur-Romuz, p. 240.

Baillie, Bk. 3, Chap. 8, p. 312. Zaidu-nil-Ambani, Vol. 1, p. 334.

¹ See Art. 310.

² See Art. 82.

Art. 243. When a husband uses the expression "All that which is lawful, or all that which God and Muslims regard as lawful is forbidden me," all his wives, if he has more than one, are irrevocably repudiated, even in the case of the husband's denial of any intention to repudiate them. Should he declare that he wished a final, or triple repudiation, his statement must be accepted.

Expressions that constitute an irrevocable repudiation.

But when he addresses these expressions to a particular wife "That which is unlawful is binding upon me," or "I have rendered thee unlawful" or "Thy union with me ceases to be lawful," she only incurs a single irrevocable repudiation; his other wives, if he has any, are not affected thereby.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 602; Fatawa-i-Kazi Khan, Vol. 2, p. 247; Tahtavi, Vol. 2, pp. 133, 183, 184; Bahrr-ul-Rayek, Vol. 4, p. 75.

Zaidu-nil-Ambani, Vol. 1, p. 334.

See *Buksh Ali v. Ameerun Bibee*, 2 W. R. 207 (1865); *Furzund Hossein v. Janu Bibee*, I. L. R. 4 Cal., 588 (1878).

Art. 244. With the exception of the three expressions mentioned in Article 229, all other expressions effect, as the case may be, an irrevocable repudiation, perfect or imperfect, in accordance with the intention expressed by the husband.

All expressions other than those mentioned in Art. 229, effect an irrevocable repudiation.

Notes.

Hedaya, Vol. 2, pp. 353, 354.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 2, p. 84; Zaidu-nil-Ambani, Vol. 1, p. 336.

Art. 245. When a husband makes a vow of continence, and fulfils it by refraining from having any intercourse with his wife, for the period of four months, an irrevocable repudiation is effected, and the husband is released from his oath if made for a fixed period.

Where a vow of continence effects an irrevocable repudiation.

Notes.

Tahtavi, Vol. 2, pp. 178, 179, 180, 181.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 7, p. 109 ; Zaidunil-Ambani, Vol. 1, p. 337 ; Clavel, Vol. 1, p. 246.

Legal
effects of
irrevocable
repudiation.

Art. 246. An imperfect irrevocable repudiation, pronounced either once or twice, dissolves the marriage immediately. It takes away from the husband his marital authority¹ over the wife, causes a cessation of the marriage rights and duties, and leaves no trace of the marriage beyond the *Iddat*² to be observed by the wife.

The husband and wife must occupy separate apartments, and must cease to hold any communication with each other : and, if this is not practicable in the same house inhabited by them, the husband, if a profligate, should withdraw elsewhere.

If either the husband or wife die³ during the period of *Iddat*, the survivor cannot inherit from the deceased, except where the repudiation is made by the husband in his death-illness against his wife's wish, or where the wife provoked her husband to repudiate her during her death-illness.⁴

Notes.

Bahrr-ul-Rayek, Vol. 3, p. 253 ; Tahtavi, Vol. 2, pp. 101, 230, 231 ; Fatawa-i-Kazi Khan, Vol. 2, p. 268.

Baillie, Bk. 3, Chap. 1, p. 205 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 6, p. 107 ; Chap. 12, pp. 133, 134 ; Zaidunil-Ambani, Vol. 1, p. 339 ; Clavel, Vol. 1, p. 210.

An order of Magistrate for payment of maintenance to wife is not enforceable, after the husband has repudiated her according

to Mahomedan law—*In re Kasam Pirbhai*, 8 Bom. H. C. Rep. c. c. 95 (1871).

Where a Mahomedan, while in health, repudiated his wife, and subsequently died during the period of her *Iddat*, held, that the repudiated wife is not entitled according to Mahomedan law, to inherit from her husband—*Sarabai v. Rabiabai*, I. L. R., 30 Bom., 537, *per* Bachelor, J. (1905).

See *Nepoor Aurat v. Jurai*, 10 B. L. R. Ap. 33 (1873) ; *In re Abdul Ali Ishmailji*, I. L. R. 7 Bom. 180 (1883) ; *Ibrahim v. Syed Bibi*, I. L. R., 12 Mad., 63 (1888).

Art. 247. Where the wife is repudiated by one or by two irrevocable repudiations, re-marriage with her late husband is not prohibited. He can marry her during or after the period of *Iddat*¹ but he can only do so with her voluntary consent, and by virtue of a fresh contract and a new dower. No one else can validly marry her during the period of her *Iddat*.

Where husband can re-marry a wife repudiated twice.

Notes.

Bahrr-ul-Rayek, Vol. 4, p.61.

Zaidu-nil-Ambani, Vol. 1, p. 341.

Art. 248. Final or triple repudiation² dissolves the marriage at the moment it is pronounced. It does away with the husband's authority over his wife, and renders the wife unlawful to her husband.

Legal effects of a final or triple repudiation.

Whoever, by one single expression, pronounces a triple repudiation against his wife with whom marriage is not consummated, or whoever pronounces three repudiations, whether successively or by a single formula, against a wife with whom marriage has been consummated, cannot marry her again.

¹ See Art. 310.

² See. Art. 226.

For their re-union to take place, it is necessary that the wife should have been married to another husband by a valid and binding contract, that she should have been repudiated or have become a widow after a real and *bonâ fide* consummation of marriage, and that she should have completed the period prescribed for the *Iddat* consequent upon repudiation or widowhood.

The death of the second husband, before consummation of the marriage, cannot make the wife's re-union with her first husband lawful.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 52 ; Radd-ul-Muhtâr, Vol. 2, pp. 492, 493, 582, 583, 584, 585 ; Tahtavi, Vol. 2, p. 175.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 4, p. 108 ; Zaidunil-Ambani, Vol. 1, p. 341.

A Mahomedan who pronounces three repudiations against his wife, cannot marry her again, until she marries another husband ; and she cannot be compelled to rejoin her husband, and continue to live with him in intercourse which, according to Mahomedan law, would be illicit and criminal—*Akhtaroon-nissa v. Shariutoollah*, 7 W. R. 268, *per* Peacock, C. J. (1867).

Legal effects
of re-mar-
riage.

Art. 249. The second marriage, once consummated, nullifies all the previous repudiations pronounced by the first husband, and when the latter remarries his former wife, he acquires entirely new authority over her, which he will not lose, until after three fresh repudiations.

Notes.

Tahtavi, Vol. 2, p. 177 ; Hedayah, Vol. 2, p. 81.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 6, p. 109 ; Zaidunil-Ambani, Vol. 1, p. 343.

Art. 250. Repudiation does not affect a woman whose marriage is void. The dissolution of such a marriage is rather a separation than a true repudiation.

Repudiation does not affect a woman whose marriage is void.

When a man pronounces three repudiations against a woman whose marriage is void, he can re-marry her by a valid contract, without the necessity of her first contracting a second marriage with another man.

Notes.

Bahrr-ul-Rayek, Vol. 3, p. 185 ; Radd-ul-Muhtâr, Vol. 2, p. 381.

Zaidu-nil-Ambani, Vol. 1, p. 345.

SECTION. III.—CONDITIONAL REPUDIATION.

(Arts. 251.—259.)

Art. 251. A repudiation, effected by words or in writing, can be either unconditional or conditional.

Repudiation may be unconditional or conditional.

It is unconditional, when the expression used by the repudiating party is couched in definite terms, and the repudiation is not made subject to any condition or circumstance nor suspended until some future date. This repudiation produces its effect immediately.

A repudiation is conditional when it is made subject to a condition or circumstance or suspended until some future time. This repudiation only takes effect upon the realization of the condition or circumstance to which it was made subject. The making of a condition is equivalent to an oath.

Notes.

Bahrr-ul-Rayek, Vol. 4, p. 2 ; Sharh-i-Vikaya, Vol. 2, p. 71 ; Tahtavi, Vol. 2, p. 150.

Baillie, Bk. 3, Chap. 2, p. 218 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Ch. 4, p. 95 ; Zaidu-nil-Ambani, Vol. 1, p. 346 ; Clavel, Vol. 1, pp. 197, 198.

See *Mymounissa v. Mohabuth Ally*, 2 Hay, 404 (1863); *Badarannissa Bibi V. Majattala*, 7 B. L. R., 442 (1871).

Repudiation
to take effect
at a future
time
explained.

Art. 252. A suspensive condition is one that relates to something uncertain, yet possible, and must be uttered without voluntary interruption.

If it relates to something certain and existing the condition is void, and the repudiation takes place immediately. But should it relate to something impossible, not only the condition but the repudiation itself is void. Any repudiation is void that is expressed in a doubtful manner or put off to a date at which its realization would be impossible, or made subject to the divine will, without any voluntary interruption between the utterance of the formula and that of the condition.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 535, 537; Bahrr-ul-Rayek, Vol. 4, p. 39; Tahtavi, Vol. 2, pp. 150, 151, 152, 159, 160.

Baillie, Bk. 3, Chap. 4, p. 266. Zaidu-nil-Ambani, Vol. 1, p. 347; Clavel, Vol. 1, p. 198.

Where such
repudiation
takes effect.

Art. 253. The suspensive condition only takes effect when the repudiation is directed against a wife with whom the repudiating party is still united, or against the wife who is observing *Iddat*, consequent upon a revocable repudiation, or against a woman whom he has regarded as repudiated before he has actually married her.

But if he makes use of the expression against a strange woman whom he does not regard in the light of a wife, and if the condition expressed is realized after his marriage with her, the suspended repudiation has no effect.

Notes.

Bahrr-ul-Rayek, Vol. 4, pp., 4, 9.

Zaidu-nil-Ambani, Vol. 1, p. 352 ; Clavel, Vol. 1, p. 180.

Art. 254. The loss of a husband's authority over his wife in consequence of either one or two irrevocable repudiations, does not nullify any conditional repudiations that may have been pronounced during the subsistence of the marriage.

Effect of
conditional
repudiation.

Thus, when a husband after having pronounced a conditional repudiation against his wife, dissolves the marriage by either one or two irrevocable repudiations, before the suspensive condition is realized, and when he afterwards renews the marriage, the conditional repudiation, no matter what its form, will take effect, provided that the condition to which it was subject is realized.

Notes.

Tahtavi, Vol. 2, p. 152.

Zaidu-nil-Ambani, Vol. 1, p. 355.

Art. 255. When a woman ceases to be a man's lawful wife, consequent upon a final or triple repudiation,¹ every conditional repudiation, even final, pronounced during the existence of the marriage is nullified.

Where
conditional
repudiation
is nullified.

If then, after having pronounced against his wife a conditional repudiation, the husband dissolves the marriage before the suspensive condition is realized, by a final and unconditional repudiation, and subsequently remarries the same woman after she has contracted and consummated marriage with a second husband, none of the conditional repudiations, pronounced during the existence

¹ See Art. 248.

of the first marriage, produce any effect in the event of realization of the condition on which they depended.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 539; Fath-ul-Kadir, Vol. 2, p. 226.

Zaidu-nil-Ambani, Vol. 1, p. 356.

Where conditions are realized.

Art. 256. The effect of a suspended repudiation or of an oath taken by the husband immediately ceases upon realization of the condition or circumstance upon which either the repudiation or the oath depended, whether the realization occurs during the subsistence of the marriage or after its dissolution.

But should the realization take place during the subsistence of the marriage or during the wife's *Iddat*, consequent upon a revocable repudiation, the conditional repudiation takes effect.

Notes.

Tahtavi, Vol. 2, p. 155.

Zaidu-nil-Ambani, Vol. 1, p. 358.

Effect of husband's oath.

Art. 257. The oath taken by the husband ceases to have effect after the first realization of the circumstance upon which the oath depended, except in the case where he uses the expression "Each time". Thus when he says to his wife "Each time you visit your sister you shall be repudiated," the husband is not released from his oath until her third visit. Should he re-marry the woman, after she has complied with the conditions, the former oath has no effect.

It is otherwise when the husband says "Each time I marry a wife, she shall be repudiated". In this case the effect of the oath never ceases, and every wife he marries even after a second marriage, is *ipso facto* immediately repudiated

Notes.

Tahtavi, Vol. 2, pp. 154, 155.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 4, p. 95 ; Zaidunil-Ambani, Vol. 1, p. 360; Clavel, Vol. 1, p. 180.

Art. 258. When a husband makes repudiation subject to two conditions, or two different circumstances, both conditions or circumstances, or the last condition or circumstance, must be realized during the subsistence of the marriage or during the wife's *Iddat*,¹ consequent upon a revocable repudiation.

Where repudiation is subject to two conditions.

Notes.

Tahtavi, Vol. 2, p. 158.

Baillie, Bk. 3, Chap. 2, p. 221 ; Zaidunil-Ambani, Vol. 1, p. 362.

Art. 259. Where the condition depends on a fact, to which the wife can alone testify, her declaration holds good only in respect of that which concerns her personally.

Effect of wife's declaration.

Notes.

Tahtavi, Vol. 2, p. 156.

Zaidunil-Ambani, Vol. 1, p. 364.

SECTION IV.—REPUDIATION SUBJECT TO WIFE'S CONSENT.

WIFE'S POWER TO REPUDIATE HERSELF (TAFWEEZ).

(Arts. 260—265.)

Art. 260. The husband himself can pronounce repudiation to his wife, and can confer upon her the power of pronouncing it herself. This concession, can be accorded to her by an express authority to repudiate herself at her discretion, but when once made, it cannot be withdrawn by the husband, without the wife's consent.

Husband can pronounce repudiation himself or empower his wife to do so.

¹ See Art. 310.

Notes.

Bahrr-ul-Rayek, Vol. 3, p. 335 ; Tahtavi, Vol. 2, p. 139 ; Fath-ul-Kadir, Vol. 2, p. 200.

Baillie, Bk. 3, Chap. 3, p. 237 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 3, p. 87 ; Zaidu-nil-Ambani, Vol. 1, p. 367 ; Clavel, Vol. 1, pp. 203, 205.

A Mahomedan husband can confer upon his wife the power of pronouncing repudiation to herself.—*Ashruf Ali v. Ashad Ali*, 16 W. R., 260 (1871) ; *Badarannissa Bibi v. Majiattala*, 7 B. L. R., 442 (1871) ; *Hamidoollah v. Faizunnissa*, I. L. R., 8 Cal., 327 (1882) ; *Nuruddin v. Chenuri*, 3 Cal. L. J., 49 (1905).

See *Mymounissa v. Mohabuth Ally*, 2 Háy, 404 (1863).

Where wife
is empowered
to choose
between
maintenance
or repudia-
tion.

Art. 261. Where a husband confers upon his wife the power of choosing between the maintenance or dissolution of the marriage, she must come to a decision at the same meeting, however long it may last, at which she receives the power, or at the moment she is informed of it if she was absent.

But, if before disclosing her intention, the wife leaves the meeting, or busies herself with another matter, she loses the right of disposing of her person, unless the husband has given her the power to make known her intention whenever she pleases, or has fixed for her a period in which to decide.

In the first case, she can decide at will for or against repudiation, in the second case she loses this right at the expiry of the fixed period, even though she was only informed of the matter after expiry of such period.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 515 ; Tahtavi, Vol. 2, pp. 139, 140.

Baillie, Bk. 3, Chap. 3, pp. 240, 252 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 3, s. 1, p. 87 ; Zaidu-nil-Ambani, Vol. 1, p. 368.

Art. 262. Where a wife on whom her husband has conferred a discretionary power, decides upon the dissolution of the marriage, and at the same meeting replies that she wishes for a repudiation, a single irrevocable repudiation operates, even though the husband should have wished two or even three.

Where a single irrevocable repudiation operates.

Notes.

Tahtavi, Vol. 2, pp. 141, 144 ; Fatawa-i-Alamgiri, Vol. 2, p. 78.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 3, s. 1, p. 88 ; s. 2, p. 89 ; Zaidunil-Ambani, Vol. 1, p. 370.

Art. 263. Where a husband proposes repudiation to his wife by pronouncing the express formula "Repudiate thyself", and she there and then repudiates herself, a revocable repudiation takes effect.

Where a revocable repudiation takes effect.

Notes.

Tahtavi, Vol. 2, p. 146 ; Fatawa-i-Alamgiri, Vol. 2, p. 86.

Zaidunil-Ambani, Vol. 1, p. 371.

Art. 264. When a wife goes beyond the proposal of her husband and pronounces more repudiations than she was authorized to pronounce, no repudiation whatever takes effect. Thus, if only permitted one single repudiation, she pronounces a triple repudiation, no repudiation at all takes place. But if permitted three repudiations, and she pronounces one only, that one repudiation shall take effect.

Where the wife exceeds her authority in the number of repudiations.

Notes.

Tahtavi, Vol. 2, p. 147.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 3, s. 3, p. 92 ; Zaidunil-Ambani, Vol. 1, p. 371.

Where the wife does not adhere to the form of repudiation authorized.

Art. 265. When a wife does not adhere to the form of repudiation indicated by her husband, the repudiation does not become void, but is confined within the limits of the husband's proposal. Thus, if she pronounces an irrevocable repudiation when only authorized to repudiate herself by revocable repudiation or *vice versa*, the repudiation proposed by her husband is to take effect.

Where the husband gives his wife liberty to separate herself from him whenever she pleases, any modification of the right so allowed her, renders the repudiation she pronounces void, whether the modification relates to the form or number of the repudiations.

Notes.

Tahtavi, Vol. 2, pp. 147, 148.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 3, s. 3, p. 92 ; Zaidunil-Ambani, Vol. 1, p. 373.

SECTION V.—REPUDIATION DURING ILLNESS.

(Arts. 266—272.)

Repudiation during illness.

Art. 266. When a husband's life is endangered through illness, even though he be not confined to bed, and he is prevented from attending to his business away from home, he is unable to repudiate his wife, without being suspected of a design to defraud her of her share in his inheritance. Nor can he during such illness dispose of more than a third of his property by legacy or gift.¹

Notes.

Tahtavi, Vol. 2, pp. 165, 166.

Baillie, Bk. 3, Chap. 5, p. 277 ; Hamilton's Hedayah, Vol. 1, p. 101 ; Zaidunil-Ambani, Vol. 1, p. 374.

¹ See Art. 495.

On the repudiation during illness Bachelor, J., observed as follows :—

“The fact of a valid divorce being thus established, it becomes material to consider whether it was pronounced during the husband’s death-illness or not. For the sake of brevity I shall use the word ‘sickness’ as referring only to death-sickness and the word ‘health’ will serve to denote the absence of death-sickness, this usage being also in conformity with the language of the books. First, then, what is meant in Mahomedan law by this sickness or *marz-ul-maut* ? Baillie, in discussing the subject under the head of divorce, says :—“it is correct to say that, when a man is unable to go out of his home for necessary avocations, he is sick, whether he can stand up in the house or not !” This is developed in later passages, but since they depend upon an underlying legal principle, I must pause to explain what that principle is, so far as I can collect it from the approved authorities. For in such a matter as this it appears to me that my only course is to abide by the accepted authorities, adhering to whatever clear principles may be discernible. In this particular instance both the principle and the reason upon which it is grounded seem to be unmistakeable. They will be found generally in discussions upon the opinions of Shafei, the Imam-ul-Motlebi, of whom Hamilton writes that “His decisions in civil and criminal jurisprudence are seldom quoted by the doctors of Persia or India but with a view to be refuted or rejected.” (Hamilton, Vol. 1, p. 28, Discourse). The references are all throughout to the four Volumes (edition of 1791.) Shafei, who maintains what may be called the common law position in these matters, held that whether a man’s death took place before or after the expiration of the *Iddat*, his divorced wife was left without any right of inheritance, because the conjugal relation was cancelled by the supervening divorce. But this view was rejected on what approximates to the equitable principle that the cause of the wife’s right to inherit is in the death-illness, and as the husband designs to defeat it, his device ought to return to himself by postponing the effect of his act till the expiration of the *Iddat*, to prevent the injury which would otherwise fall upon her. (Baillie, page 278). So repudiation by a man in his last illness is always referred to as repudiation by a *faar* or evader, and the principle appears to be the perfectly intelligible doctrine that a wife’s slowly accrued

rights shall not be suddenly defeated by the caprice of the husband while labouring under such mental infirmity as usually accompanies the approach of death. These observations must be applied when I come to deal with the question of the effect of this divorce upon the plaintiff's rights. But I am obliged to notice them here since they are germane also to the question of the meaning of death-illness. Thus we read Hamilton's Hedaya, Vol. 1, page 283 :—" If a husband, being in a besieged town or in an army, repudiate his wife by three divorces, she does not inherit of him, in the event of his death, although that should happen within her *Edit* : but if a man engaged in fight, or a criminal carrying (? being carried) to execution, were in such situation to pronounce three divorces upon his wife, she inherits where he dies in that way, or is slain : for it is a rule that the wife of a *faar* (or evader) inherits of him, upon a favourable construction of the law ; and his evasion cannot be established but where her right is inseparably connected with his property, which is not the case, unless he be (at the time of pronouncing divorce) sick of a *dangerous* illness (appearing from his being confined to his bed, and other symptoms) or in such other situation as affords room to apprehend his death : but it is not established where he pronounces divorce in a situation in which his *safety* is more probable than *destruction*." Baillie (pages 280-81) has very much the same description. " Evasion," he says, " may also be established by other causes which come within the meaning of disease, if death be imminent ; but if the chances are in favour of escape, the person is to be accounted as one in health. So that one is not an evader though he were surrounded by the enemy, or in the line of battle, or in a place abounding with beasts of prey, or on board ship, or in prison under sentence of retaliation or stoning ; because in all these cases a way of escape may be found by some means or other." I pause here to remark, first, that these are strong cases, and secondly, that if the principle is to be applied loyally, it must count for something whether the divorcer himself is conscious of the likelihood of death or is not so conscious. The same subject occurs again in Baillie's Chapter on Gifts, where I see no reason to suppose that the death-illness discussed differs from the death-illness in case of repudiation. And here we read that " the most valid definition of death-illness is, that it is one which it is highly probable will issue fatally, whether, in the case of a man,

it disables him from getting up for necessary avocations, out of his house or not, such as, for instance when he is a merchant, from going to his shop." This appears to be the definition in the Fatawa-i-Alamgiri, and I may say briefly that other relevant authorities appear to follow the same lines. It would follow that what is meant by death-illness in Mahomedan law is an illness which does in fact cause death, which disables the sufferer at the given time from pursuing his ordinary avocations, and which raises in his mind some apprehension of the probability of death. So where the illness is of long duration, but there is no immediate probability or apprehension of death, it is laid down that that is not a death-illness but is to be regarded rather as an indication merely of altered constitution or physical habit. Indeed upon examining the books I seem to find that the only certain test of death-illness laid down is that a man shall not be able to stand praying—no doubt rather a rough test adopted in days when medical diagnosis was itself rough, but indicating pretty clearly the rigorous meaning which Mahomedan jurist attached to the phrase *marz-ul-maut*.

The Hedaya contains what is called a rule for ascertaining a death-illness, and this will be found in Book LII, Chapter 2 of Hamilton, Volume 4, page 506. Whatever may be the case in the original Arabic, it must be confessed that in the translation the passage is encumbered with much confusion, the particular being confounded with the general, and the sentence being further darkened by parentheses. But, so far as any plain meaning is to be wrung from the words, it would seem that the test is "immediate danger of death" or "apprehension of death"; and this conforms to the principle which has already been deduced. Again it is laid down by Fatawa-i-Kazi Khan that he only is to be deemed sick who is bed-ridden and incapable of managing his affairs "because the probability from his condition is dissolution," so that if he divorces his wife, he is a *jaar*, i. e., a runner away, an evader. "But", we read, "a person who is decrepit or suffering from paralysis, whose complaint does not go on increasing every day, is like one in health. So also one who is wounded or is suffering from pain, but who is not by such wound or pain rendered bed-ridden, is like one in health." And then we find the instances of the man arrayed in rank against an enemy in battle or imprisoned under sentence of death, to which I have already referred.

I admit that this question is not to be decided merely upon medical principles as now ascertained among western peoples : but my examination of the authorities leads me to the conclusion that in order to establish *marz-ul-maut* there must be present at least these conditions:—(a) proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is, that at the given time death must be more probable than life :

(b) There must be some degree of subjective apprehension of death in the mind of the sick person :

(c) There must be some external indicia, chief among which I would place the inability to attend to ordinary avocations. These, then, are the incidents of death-illness which, as it seems to me, are to be gathered from the authorities ; and that they have commended themselves also to our British Court may, I think, be seen on reference to *Fatima Bibee v. Ahmad Baksh* (I. L. R., 31 Cal., 319, 1903), and the cases there cited.”—*Sarabai v. Rabiabai*, I. L. R., 30 Bom., 537 (1905).

Repudiation
in other
cases.

Art. 267. When a man exposes himself to danger, such as he who leaves the ranks to engage in single combat, or when he is under sentence of death and acting just before his execution, or when he is on board a ship, tempest tossed and exposed to imminent peril, he is placed on the same footing with regard to repudiation as those who are sick

Notes.

Tahtavi, Vol. 2, pp. 165, 166.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 5, p. 401 ; Zaidunil-Ambani, Vol. 1, p. 375.

Repudiation
by persons
suffering
from phthisis,
paralysis,
&c.

Art. 268. The impotent man, the man suffering from pulmonary phthisis, and the paralytic man, all whose infirmities grow worse day by day, are legally placed in the same situation as those who are sick. But should their infirmities become chronic and remain stationary for a whole year, without undergoing any change or

manifesting graver symptoms, all legal contracts which they enter into, and the repudiations which they make, are as valid as those of a man in good health.

Notes.

Tahtavi, Vol. 2, p. 165 ; Fatawa-i-Alamgiri, Vol. 2, p. 123.

Zaidu-nil-Ambani, Vol. 1, p. 376.

Art. 269. When a husband while suffering from a dangerous illness, or while in a critical position, voluntarily pronounces against his wife, but without her consent, an irrevocable repudiation, and dies, during the wife's *Iddat*, consequent upon such repudiation, the wife retains her right to inherit from him, provided that from the time she was repudiated until the moment of her husband's death, she has not lost the qualifications necessary for such inheritance.

Effects of an irrevocable repudiation during husband's illness, and wife's right to inheritance on husband's death.

If the husband recovers from the illness or is saved from the danger, during which he repudiated his wife, and dies subsequently from another illness or from some accident before the expiry of his wife's *Iddat*, she is not entitled to her share in his estate.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 564, 565, 566, 567.

Baillie, Bk. 3, Chap. 5, pp. 277, 278 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 5, pp. 99, 100 ; Zaidu-nil-Ambani, Vol. 1, p. 377.

Where a Mahomedan husband pronounced repudiation against his wife, and subsequently died during the period of her *Iddat*, Bachelor, J., observed as follows :—

“The result of the inquiry so far has been to establish that this divorce was pronounced by the husband when in health. And the divorce was the *bain talak* or irrevocable divorce. Now the question is whether, an irrevocable divorce having been

pronounced in health, and the husband dying during the period of the discarded wife's *Iddat*, she has any claim to inherit. There can, I think, be no doubt, and I understand, that Mr. Lowndes does not dispute that if the divorce had been pronounced in death-illness, the wife's claim to inherit would survive throughout the period of her *Iddat*. But this survival is based upon the theory already noticed that a death-bed divorce is to be regarded as an evasion. Clearly that principle fails where the divorcing husband is in health and is under no greater expectation of death than is normally incident to humanity. In that case, then, what reason is there why the wife's claim should subsist throughout her *Iddat* even though she has been irrevocably divorced? I can see none on the principle of the thing. Indeed the principle appears to point the other way. For, take the case where a man in perfectly good health to-day irrevocably divorces his wife, and is killed in a railway accident a month hence. Why should she inherit? There has been no attempt at evasion; the repudiation has been complete and definitive; and I can discern no reason why the husband's estate should be damnified owing to an unforeseen accident. So far as the principle is a guide, it seems clear that such a wife would have no claim; and the plaintiff stands legally in precisely the same case."—*Sarabai v. Rabiabai*, I. L. R., 30 Bom., 537 (1905).

Cases in which a wife repudiated during her husband's last illness, is entitled to her share in his estate.

Art. 270. In the following cases a wife repudiated by her husband during his last illness, is also entitled to inherit from him provided he dies during the period of her *Iddat*:—

1. When she has asked her sick husband to repudiate her by a revocable form, and he has repudiated her by an irrevocable form, either by one or by a triple repudiation.

2. When the husband and wife have been judicially separated in consequence of an oath¹ of imprecation

3. When the husband has made a vow of continence against his wife, and allowed the prescribed period to elapse without cohabiting with her.

¹ See Art. 335.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 567.

Baillie, Bk. 3, Chap. 5, pp. 277, 280 ; Zaidunil-Ambani, Vol. 1, p. 380.

Art. 271. In the following cases the repudiated wife has no right to her husband's succession :—

Cases in which a wife is not entitled to inherit

1. When the husband has been compelled to repudiate his wife under threat of death.

2. When the wife has voluntarily asked to be repudiated irrevocably.

3. When the husband, while in good health, has made a vow of continence against his wife, and, while in a state of illness, has allowed to elapse the period after which the repudiation becomes irrevocable.

4. When of her own free will, the wife has asked for a *Khula* repudiation or chosen to have the marriage dissolved at puberty, or has obtained a decree of separation on the ground of the husband's impotency.¹

5. When the wife at the time of repudiation was a Christian or Jewess, even though she becomes a Muslim before her husband's death, or when a Muslim wife abjures the faith at the time of repudiation. In the last case her return to Islam before her husband's death, would not reinstate her in her rights to his succession.

6. When the wife has been repudiated irrevocably either during her husband's imprisonment, even for a crime punishable with death, or while he was confined in a besieged fort, or in the fighting line, or on board a vessel before danger became imminent, or during an epidemic, or while he was suffering from an illness which did not prevent him from attending to his business out of doors.

¹ See Art. 298.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 566, 567, 568.

Baillie, Bk. 3, Chap. 5, pp. 278—281 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 5, pp. 100, 103 ; Zaidunil-Ambani, Vol. 1, p. 381 ; Clavel, Vol. 1, p. 210.

Where husband is entitled to his share in wife's estate when she has brought about the dissolution of marriage.

Art. 272. Where a wife, while suffering from an illness that renders her unable to perform the household duties, brings about the dissolution of her marriage through the exercise of her right of option at puberty, and where she dies during her *Iddat*, her husband is entitled to his share in her estate.

Notes.

Tahtavi, Vol. 2, p. 169.

Baillie, Bk. 3, Chap. 5, p. 280 ; Zaidunil-Ambani, Vol. 1, p. 385.

CHAPTER II.

REPUDIATION BY MUTUAL CONSENT OF HUSBAND AND WIFE IN KHULA FORM.

(Arts. 273—297.)

Dissolution of marriage by repudiation and by *Khula* form.

Art. 273. When after a valid marriage, the husband and wife disagree and fear that they will not properly fulfil those duties which spring from marriage they can separate by repudiation (*Talak*) as well as by repudiation in *Khula* form.

Notes.

Hedaya, Vol. 2, p. 384 ; Radd-ul-Muhtâr, Vol. 2, pp. 450, 604.

Baillie, Bk. 3, Chap. 8, p. 304 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 8, p. 112 ; Zaidunil-Ambani, Vol. 1, p. 386.

Khula is a species of repudiation for a consideration when the spouses do not conform to the conditions of marriage. It is legal in the sense of emancipation. It takes place by mutual

consent on a consideration paid ; but is not obligatory. The Court cannot, on demand of the wife, against the assent of the husband, award separation on account of dissension. The law has fixed no specific sum as the price of emancipation. It depends on mutual assent ; but to exact more than dower, in case of aversion on the part of the wife, is condemned.—*M. Abdul Wahab v. Hingu*, 5 Sel. Rep., S. D. A., 238 (1832).

A repudiation by *Khula* is a repudiation with consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matter of arrangement between the husband and wife, and the wife may, as the consideration, release her *dain mahr* and other rights, or make any other agreement for the benefit of the husband—*Buzul-ul-Raheem v. Luteefutoon-nissa*, 8 M. I. A., 379 (1861).

According to Mahomedan law a *Khula* is valid even though it may be granted under compulsion. The conditions, however, which nullify a *Khula* are those which are repugnant to the nature of the contract.—*Vadake Vitol Ismal v. Beyakutti Umah*, I. L. R., 3 Mad., 347 (1881).

Art. 274. In order that a *Khula* repudiation may be valid, the husband must have reached his majority and be in full possession of his mental faculties, and such repudiation must be pronounced during the subsistence of the marriage or during the wife's *Iddat*.¹

Conditions necessary in a *Khula* repudiation.

Notes

Radd-ul-Muhtâr, Vol. 2, p. 605.

Zaidu-nil-Ambani, Vol. 1, p. 387.

Art. 275. A *Khula* repudiation can validly take place before or after consummation of the marriage, and without payment of compensation by the wife.

Where *Khula* repudiation is validly effected.

Notes.

Bahrr-ul-Rayek, Vol. 4, p. 78 ; Radd-ul-Muhtâr, Vol. 2, p. 604.

Zaidu-nil-Ambani, Vol. 1, p. 388.

¹ See Art. 310.

Husband
can pay
compensa-
tion of
greater
amount than
dower.

Art. 276. The husband can legally repudiate his wife in *Khula* form by paying compensation of a greater amount than that which he paid as dower.

Notes.

Hidaya, Vol. 2, p. 385.

Clavel, Vol. 1, p. 220.

See Sale's Koran, Chap. II, p. 27.

Fit subject
for compen-
sation.

Art. 277. All things capable of being settled as dower can be offered as compensation for a *Khula* repudiation.

Notes.

Hedaya, Vol. 2, p. 385.

Baillie, Bk. 3, Chap. 8, p. 310 ; Zaidunil-Ambani, Vol. 1, pp. 217, 219.

Where
Khula repu-
diation is
equivalent to
irrevocable
repudiation.

Art. 278. A *Khula* repudiation with or without compensation is equivalent to an irrevocable repudiation, according to the intention that the husband attaches to it. It can be validly pronounced by the husband without the necessity of a judicial decree.

Notes.

Tahtavi, Vol. 2, p. 187 ; Fatawa-i-Alamgiri, Vol. 2, p. 137.

Baillie, Bk. 3, Chap. 8, p. 303 ; Hamilton's, Hedayah, Vol. 1, Bk. 4, Chap. 8, p. 112 ; Zaidunil-Ambani, Vol. 1, p. 392.

Where the
proposal of
Khula re-
pudiation
emanates
from the
husband.

Art. 279. When it is the husband who first proposes a *Khula* repudiation in consideration of compensation to be paid by the wife, the validity of the repudiation and the right to enforce the payment of the compensation, depend upon the wife's consent being voluntary, and upon her being fully aware of the nature of the transaction.

Once the proposal is made, it cannot be retracted by the husband until the wife has declared her intention, which must not be deferred beyond the meeting at which she is informed of the proposal.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 604, 605, 606 ; Tahtavi, Vol. 2, pp. 186, 187.

Baillie, Bk. 3, Chap. 8, p. 304 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 8, pp. 112, 113 ; Zaidunil-Ambani, Vol. 1, p. 393 ; Clavel, Vol. 1, pp. 112, 113.

Art. 280. When it is the wife who first proposes a *Khula* repudiation to the husband offering him compensation for her release, she can retract before her husband has declared his acceptance, which must be expressed at the same meeting. Any acceptance made by the husband subsequently would not be valid.

Where it emanates from the wife.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 606.

Baillie, Bk. 3, Chap. 8, p. 314 ; Zaidunil-Ambani, Vol. 1, p. 393 ; Clavel, Vol. 1, p. 222.

Art. 281. Where a husband repudiates his wife in *Khula* form, conditionally upon her voluntarily agreeing to pay a specified amount of compensation other than the dower, she is bound to fulfil her undertaking. *Khula* repudiation thus pronounced cancels all debts between husband and wife arising from the dissolved marriage, and when *Khula* repudiation occurs before the marriage has been consummated, the wife loses all right to any balance of dower or to any arrears of maintenance, clothing, or *Mutah*.¹

Effects of *Khula* repudiation with compensation.

¹ See Art. 90.

On the other hand, if the husband has made advances for his wife's maintenance, he is not entitled to recover the amount advanced for the period still to run, nor to claim any part of the dower already paid.

Notes.

Bahrr-ul-Rayek, Vol. 4, pp. 94, 96, 97 ; Tahtavi, Vol. 2, p. 191.

Baillie, Bk. 3, Chap. 8, p. 304 ; Zaidunil-Ambani, Vol. 1, p. 397.

Where there is no compensation.

Art. 282. Where a husband pronounces *Khula* repudiation against his wife without any compensation, the respective claims of husband and wife are not cancelled, and they can sue each other for the payment of any debts which may be due.

Notes.

Bahrr-ul-Rayek, Vol. 4, p. 96.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 8, p. 113 ; Zaidunil-Ambani, Vol. 1, p. 400 ; Clavel, Vol. 1, p. 214.

Where the dower is compensation for *Khula* repudiation.

Art. 283. Where a wife has received her full dower and consents to her husband repudiating her conditionally upon her surrendering the dower, she is bound to return it. If she has not received the dower the husband is released from its payment, whether the repudiation takes place before or after the consummation of the marriage.

When the full dower has been paid and the husband consents to repudiate his wife on the understanding that she returns a portion of the dower, she will only return such portion if the marriage has been consummated, and the half of such portion if the marriage has not been consummated.

If the dower has not been delivered to her, the husband in both cases is completely released.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 138.

Baillie, Bk. 3, Chap. 8, p. 309 ; Zaidu-nil-Ambani, Vol. 1, p. 400.

Art. 284. Unless there is an agreement to the contrary, the husband at the time of *Khula* repudiation is not released from the duty of providing his wife with maintenance and lodging during the period of her *Iddat*.¹

Where husband is not released from his liability to pay maintenance.

Notes.

Bahrr-ul-Rayek, Vol. 4, p. 97.

Zaidu-nil-Ambani, Vol. 1, p. 403.

Art. 285. Where the articles constituting the compensation made by the wife, perish before delivery, or where the husband is ousted of them, the wife, if possible, is bound to substitute articles of the same nature, or to pay their value.

Where compensation perishes before delivery.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 609.

Zaidu-nil-Ambani, Vol. 1, p. 440 ; Clavel, Vol. 1, p. 216.

Art. 286. Where a husband consents to repudiate his wife in *Khula* form in consideration of her undertaking to nurse their child during its two years of suckling, or to keep and maintain the child for a fixed period at her own expense, after having weaned it, she is bound to carry out such undertaking.

Where wife undertakes at her own expense to suckle and maintain a child.

If before the expiry of the suckling period or the time agreed upon for keeping the child, the husband takes

¹ See Art. 310.

back his wife by a fresh marriage contract, or if she runs away leaving behind the child, or if she dies, or if the child dies, the husband can claim the cost of the child's suckling and its maintenance for the unexpired period, unless at the time of *Khula* repudiation, it was agreed that the husband should have no claim against the wife, in case of her or the child's decease, before the expiry of the period agreed upon.

The same rule applies when the wife has undertaken to suckle ¹ or maintain a child with which she believes herself pregnant, or bears a child which dies before expiry of the fixed period.

Notes.

Tahtavi, Vol. 2, p. 192 ; Radd-ul-Muhtâr, Vol. 2, pp. 615, 616.

Baillie, Bk. 3, Chap. 8, pp. 307, 308 ; Zaidunil-Ambani, Vol. 1, p. 404 ; Clavel, Vol. 1, p. 219.

See Sale's Koran, Chap. II, pp. 27, 28.

Where wife undertakes to maintain her children until they are of age.

Art. 287. Where a wife obtains a *Khula* repudiation, on the undertaking to keep her children born of the dissolved marriage until they are of age, she can keep the daughter until that age but not the son.

If she marries a second time, her former husband can withdraw his children from her keeping, in spite of an agreement made to the contrary, and can claim the necessary cost of their keep for the unexpired period.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 616.

Zaidunil-Ambani, Vol. 1, p. 406.

Rights of husband and wife as to custody of their children.

Art. 288. The husband's stipulation to keep his children with him during the period of *Hazanah*² is void, in spite of *Khula* repudiation being valid, and the

¹ See Art. 371.

² Or Custody of the Child, see Art. 380.

mother during the full period of *Hazanah* is not to be interfered with in the exercise of her rights as a mother, unless she forfeits such rights, in which case the father must pay the expenses of *Hazanah* and maintenance, if the child is destitute of means.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 727, 728 ; Tahtavi, Vol. 2, p. 244 ; Fatawa-i-Kazi Khan, Vol. 2, p. 257 ; Fatawa-i-Alamgiri, Vol. 2, p. 165.

Zaidu-nil-Ambani, Vol. 1, p. 406.

Art. 289. Where a wife owes a debt to her husband, the latter cannot appropriate such debt towards the amount he owes for the child's maintenance.

Where husband is bound to furnish child's maintenance.

Thus where a wife has asked for or accepted a *Khula* repudiation, on condition that she suckles or maintains her child by the husband who is repudiating her, and then finds herself destitute, she can have recourse to the husband, who in spite of her undertaking can be compelled to provide for the child's maintenance. He can, however, recover the sums thus advanced if the wife's position improves.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 616, 617.

Zaidu-nil-Ambani, Vol. 1, p. 406.

Art. 290. A father can obtain a *Khula* repudiation of his minor daughter from her husband.

Khula repudiation in respect of minors.

If he obtains the repudiation in consideration of compensation payable by the minor herself to her husband, or in consideration of her returning her dower, the repudiation takes effect, but the payment of the compensation or the return of the dower are binding neither on the wife nor on the father.

But if the father obtains a *Khula* repudiation in consideration of his personally undertaking to return the dower, or of paying compensation, the repudiation takes effect, and the father is liable for the amount of such compensation, or if the repudiation is made in consideration of dower, the wife is entitled to claim it from her husband, who may sue the father for its recovery.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 616, 617.

Baillie Bk. 3, Chap. 8 p. 319 ; Hamilton's Hedayah, Vol. 1, Bk. 1, Chap. 8, p. 116 ; Zaidunil-Ambani, Vol. 1, p. 409 ; Clavel, Vol. 1, pp. 223, 226, 364.

Where husband offers *Khula* repudiation to his minor wife conditionally upon her providing compensation.

Art. 291. Where a husband makes a direct offer of *Khula* repudiation to his minor wife, making it a condition that she pays him some specified compensation, the repudiation will take effect, provided she consents and has attained the age¹ of reason and is able to understand the nature of the repudiation, but the payment of the compensation is not binding on the wife, and her right to the dower still remains intact.

Where a wife, having reached the age of reason, agrees to be repudiated by her husband in consideration of compensation, such repudiation operates as a simple revocable repudiation, and she preserves all her right to the dower.

Notes.

Tahtavi, Vol. 2, p. 193 ; Radd-ul-Muhtâr, Vol. 2, pp. 616, 617, 618.

Zaidunil-Ambani, Vol. 1, p. 411.

¹ See Art. 565.

Art. 292. In no case can a father consent to *Khula* repudiation in the name of his minor son, nor can the father's ratification render valid a repudiation pronounced by the minor son himself.

Father has no power to accept *Khula* repudiation on behalf of his minor son.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 617.

Baillie, Bk. 3, Chap. 8, p. 319 ; Zaidunil-Ambani, Vol. 1, p. 412.

Art. 293. A *Khula* repudiation by an adult wife, who is legally incompetent, is valid, but payment of any compensation that she agrees to pay is not binding upon her.

Khula repudiation by wife legally incompetent.

Where a husband, in consideration of compensation, repudiates his wife who is legally incompetent,¹ such repudiation will effect a simple revocable repudiation.

Notes.

Tahtavi, Vol. 2, p. 193 ; Radd-ul-Muhtâr, Vol. 2, p. 617.

Zaidunil-Ambani, Vol. 1, p. 412 ; Clavel, Vol. 1, pp. 223, 226, 364.

Art. 294. A wife in her last illness can validly offer a *Khula* repudiation with compensation. If she dies during the period of her *Iddat*, her husband is entitled to whichever be the smallest of the three following amounts, *viz.* :—the share of her estate devolving upon him, or the amount of compensation agreed upon, or the third part of the deceased's estate.

Effects of *Khula* repudiation offered by wife during last illness.

If she dies after the expiry of *Iddat*, her husband shall get whichever is smaller in amount, the compensation, or the third of the deceased's estate.

¹ See Art. 553.

If she recovers from her illness, her husband is entitled to the whole of the amount of compensation agreed upon.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 619.

Baillie, Bk. 3, Chap. 8, p. 320 ; Zaidunil-Ambani, Vol. 1, p. 413.

Liability of agent for compensation in *Khula* repudiation.

Art. 295. Where an agent is authorized by a wife to consent to a *Khula* repudiation, he is not directly responsible to her husband for the compensation which she agrees to pay, unless he personally undertakes to pay the amount, or becomes surety on the wife's behalf.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 617 ; Tahtavi, Vol. 2, p. 193.

Zaidunil-Ambani, Vol. 1, p. 415.

When compensation is payable

Art. 296. Compensation can be paid at the time of *Khula* repudiation, or can be made payable at a more or less distant date.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 142.

Zaidunil-Ambani, Vol. 1, p. 415.

Compensation where marriage is void.

Art. 297. When the marriage is void, the husband is bound to return any sum received by him by way of compensation for repudiating his wife in *Khula* form.¹

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 604.

Zaidunil-Ambani, Vol. 1, p. 216.

¹ See Art. 227.

CHAPTER III.

SEPARATION ON ACCOUNT OF THE HUSBAND'S IMPOTENCY.

(Arts. 298—302.)

Art. 298. Where a wife discovers that her husband is impotent and not in a condition to fulfil the duty of marriage, she has the right to demand before a Judge a *tafrik* or formal separation, provided that at the time of marriage contract, she was ignorant of her husband's condition.

Where wife is entitled to demand separation for impotency.

However long her silence, after she has discovered her husband to be impotent, the wife does not forfeit this right, either before or after her recourse to law.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 643, 646, 647; Fatawa-i-Kazi Khan, Vol. 1, p. 186.

Baillie, Bk. 3, Chap. 11, pp. 347, 348; Zaidunil-Ambani, Vol. 1, p. 416.

See *A* (the wife) v. *B* (the husband), I. L. R., 21 Bom., 77 (1896).

Art. 299. When a wife brings an action against her husband alleging him to be impotent, and demanding a separation, the judge, if the husband admits the impotency, must grant him a postponement of the separation for one full lunar year. This postponement includes the month of *Ramazan*,¹ the menstrual periods of the wife, and the time during which the husband is absent on a pilgrimage or any other journey; but it is not to include the period of the

Where the judge is to grant postponement for a year.

¹ The ninth month of the Mahomedan year which is observed as a strict fast from dawn to sunset of each day in the month—Hughes Dictionary of Islam.

illness of either party when such illness prevents cohabitation.

The year is to commence from the date of the wife's action, but should her husband be ill, or a minor, or in *Ihram*,¹ the year is to commence from his recovery from illness, from his coming of age, or from the time he lays aside the pilgrim's dress.

Notes.

Fatawa-i-Alamgiri, Vol. 2, pp. 155, 156, 157 ; Radd-ul-Muhtâr, Vol. 2, pp. 645, 646.

Baillie, Bk. 3, Chap. 11, pp. 345, 346 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 11, pp. 126-128 ; Zaidunil-Ambani, Vol. 1, p. 417.

Where the judge is to pronounce separation.

Art. 300. If, at the end of the year, the wife still complains of the lack of cohabitation on the part of the husband, and insists on separation, the judge shall call upon the husband to repudiate her. In case of his refusal, the judge shall pronounce a separation, which operates as a valid repudiation.

Notes.

Tahtavi, Vol. 2, p. 212 ; Radd-ul-Muhtâr, Vol. 2, pp. 643, 644.

Baillie, Bk. 3, Chap. 11, p. 348 ; Zaidunil-Ambani, Vol. 1, p. 419 ; Clavel, Vol. 1, p. 126.

Where the husband denies the wife's allegation of impotency.

Art. 301. If the husband before or after the judicial postponement has been granted denies the truth of the allegation of the wife, the judge shall appoint two trustworthy matrons to examine her.

If the matrons state that she is not a virgin, the husband's sworn declaration shall be accepted. This holds good whether the wife, before he married her, was virgin

¹ The pilgrim's dress or mantle.

or not, and even where she maintains that her virginity was lost through an accident.

If the husband takes the oath, the wife cannot proceed further against him. If he refuses the oath, or if the matrons declare that the wife is still a virgin, the judge, where the husband has denied the allegation before postponement was granted, shall grant the postponement referred to in the previous Article. Where he admits the allegation, the wife, at the same sitting, can declare her option, either of upholding the marriage, or of having it dissolved. If she chooses separation, the judge shall pronounce it immediately.

Should she change her mind and elect to remain with her husband, or leave the court during the hearing of the case her right of option ceases, and she can no longer complain against her husband's impotency.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 647, 648.

Baillie, Bk. 3, Chap. 11, p. 347 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 11, p. 127 ; Zaidu-nil-Ambani, Vol. 1, p. 420 ; Clavel, Vol. 1, p. 125.

Art. 302. Separation on account of impotency, creates no prohibition of marriage, and the parties can marry again under a new contract either during or after the period of *Iddat*.¹

Effects of separation for impotency.

Should either the husband or wife die during the period of *Iddat*, the survivor cannot inherit from the deceased.

Notes.

Tahtavi, Vol. 2, pp. 212, 213 ; Fatawa-i-Alamgiri, Vol. 2, pp. 123, 124, 128.

Zaidu-nil-Ambani, Vol. 1, p. 421.

¹ See Art. 310.

CHAPTER IV.

SEPARATION ON ACCOUNT OF APOSTASY.

(Arts. 303—309.)

Separation when either husband or wife apostatizes.

Art. 303. If either the husband or the wife should apostatize, both of them being Muslims, the marriage is immediately dissolved and separation must take place. In this case there is no need for a judicial decree.

Notes.

Tahtavi, Vol. 2, p. 84.

Baillie, Bk. 1, Chap. 10, p. 182 ; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 5, p. 66 ; Zaidunil-Ambani, Vol. 1, p. 421 ; Clavel, Vol. 1, pp. 95, 247.

Legal effects of such separation.

Art. 304. Separation for apostasy only creates a provisional prohibition, which ceases with the cause that produces it.

If the apostate returns to Islam, he can validly renew the marriage tie with the wife, without being compelled to renew the marriage contract. If it is the wife who becomes an apostate, she shall return to the faith and renew the marriage receiving a small dower.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 425 ; Tahtavi, Vol. 2, p. 84.

Zaidunil-Ambani, Vol. 1, p. 423 ; Clavel, Vol. 1, pp. 248, 249.

Where husband and wife apostatize at the same time.

Art. 305. If both husband and wife abjure the faith of Islam at the same time, or do so successively, without it being possible to determine which of them abandoned the religion first, and should they in like

manner return to Islam, the marriage remains undissolved. It is only dissolved when one returns to Islam before the other.

Notes.

Tahtavi, Vol. 2, p. 85.

Baillie, Bk. 1, Chap. 10, p. 182; Hamilton's Hedayah, Vol. 1, Bk. 2, Chap. 5, p. 66; Zaidunil-Ambani, Vol. 1, p. 424; Clavel, Vol. 1, p. 249.

Art. 306. If apostasy takes place after consummation of marriage, the wife is entitled to the full dower, whether it is the husband or the wife who becomes an apostate.

Where apostasy takes place after consummation of marriage.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 425.

Baillie, Bk. 1, Chap. 10, p. 182; Zaidunil-Ambani, Vol. 1, p. 424.

Art. 307. When apostasy precedes the consummation of the marriage, and it is the husband who becomes an apostate, the wife is entitled to half the stipulated dower, or to *Mutah*¹ if no dower was stipulated, and to maintenance for the period of *Iddat*.²

Where it precedes consummation.

If it is the wife who becomes an apostate, she is entitled neither to half the dower, nor to *Mutah*.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 425.

Baillie, Bk. 1, Chap. 10, pp. 182, 183; Zaidunil-Ambani, Vol. 1, p. 424.

Art. 308. If the husband abjures Islam, and dies before the expiry of the period of *Iddat*² incumbent

Wife's right to inherit from her deceased husband who apostatized.

¹ See Art. 90.

² See Art. 310.

on his wife, she is entitled to claim the share of his estate devolving upon her, whether his apostasy took place during his last illness or while he was in good health.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 425.

Zaidu-nil-Ambani, Vol. 1, p. 425.

Husband's right to inherit from his wife who apostatizes in her last illness.

Art. 309. If the wife abandons Islam during her last illness and dies before the expiry of her period of *Iddat*, her Muslim husband can inherit from her. But should she apostatize while in good health and die before returning to Islam, her husband cannot inherit from her.

Notes

Radd-ul-Muhtâr, Vol. 2, p. 425.

Zaidu-nil-Ambani, Vol. 1, p. 425.

CHAPTER V.

IDDAT OR TERM OF PROBATION. MAINTENANCE OF THE WIFE DURING IDDAT.

(**Arts. 310—331.**)

SECTION I.—WIVES SUBJECTED TO IDDAT.

Cases in which *Iddat* is incumbent.

Art. 310. *Iddat*¹ or term of probation while it lasts is an impediment to marriage.² It is incumbent on every wife separated from her husband after actual consummation of the marriage, whether such marriage is valid or radically void. It is also incumbent after a regular³ or irregular retirement with the husband, so long as the marriage is valid. It is incumbent, whether the separation is due to a revocable repudiation³, or to an

¹ Retreat.

² See Bk. I, Chap. III.

³ See Art. 227.

irrevocable repudiation,¹ perfect or imperfect, or to a repudiation or judicial separation pronounced in consequence of the husband's impotency,² or his oath of imprecation,³ inferiority of dower,⁴ exercise of option at puberty, or to the annulment of a marriage that is void, or the husband's death, even where he dies before consummation in the case of a valid marriage.

Notes.

Radd-ul-Mahtâr, Vol. 2, p. 650 ; Bahrr-ul-Rayek, Vol. 4, p. 140 ; Fatawa-i-Alamgiri, Vol. 2, p. 157.

Baillie, Bk. 3, Chap. 12, p. 350 Hamilton's Hedayah, Vol 1, Bk. 4, Chap. 12, p. 128 ; Zaidunil-Ambani, Vol. I, p. 426 ; Clavel, Vol. 1, pp. 253, 254.

Iddat is defined in the Hedayah to be the term of probation incumbent upon a woman in consequence of the dissolution of marriage after carnal connection ; the most approved definition of *iddat* is the term by the completion of which a new marriage is rendered lawful—In the matter of *Din Muhammad*, 1. L. R., 5 All., 226, *per* Mahmood, J. (1882).

Art. 311. The duration of *Iddat* consequent upon repudiation,⁵ is three full periods of her courses, for a Muslim wife or a *Kitabiah*⁶ married to a Muslim husband, provided she has reached the age of puberty,⁷ and is not pregnant, and is separated from her husband after actual or presumed consummation of a valid marriage.

For women who have not attained puberty.

The period of *Iddat* is the same for a wife who has been repudiated, or who has become a widow, after cohabitation by mistake, or in consequence of the

¹ See Art. 239

² See Art. 298.

³ See Art. 335.

⁴ See Art. 32.

⁵ See Art. 217.

⁶ A female of the *Ahlu-l-Kitab*, or those who possess an inspired book, Jews and Christians—Hughes Dictionary of Islam.

⁷ See Art. 495.

annulment after consummation, of a marriage which is void.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp 650, 651, 660 ; Bahrr-ul-Rayek, Vol. 4, p. 139.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 12, pp. 128, 130 ; Zaidunil-Ambani, Vol. 1, p. 429 ; Clavel, Vol. 1, pp. 254, 255, 256.

See Sale's Koran, Chap. II, p. 26.

Period of
Iddat for
women who
have attain-
ed puberty.

Art. 312. For every wife who is not subject to menstruation, whether this is due to her not having reached the age of puberty or to advanced years, and for every young wife, who has attained the age of puberty and is not subject to menstruation, the duration of *Iddat* is three months.

When *Iddat* commences on the first day of the month, the three months are to count by the appearance of the moon even when the number of days is less than thirty.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 652, 653.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 12, p. 128 ; Zaidunil-Ambani, Vol. 1, p. 431.

See Sale's Koran, Chap. LXV, p. 454.

Where wife
repudiated
before she
has reached
the age of
puberty.

Art. 313. Where a young wife is repudiated¹ before her menstruation has commenced, and her courses appear before the three months incumbent on her are over, she must commence a fresh *Iddat* counted by her courses. Where menstruation occurs after the three months have expired, she is not obliged to observe another *Iddat*, and the marriage she may contract is valid.

¹ See Art. 217.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 657, 658.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 12, p. 129 ;
Zaidu-nil-Ambani, Vol. 1, p. 432.

Art. 314 Where a woman has had her courses for several days, after which, either through illness or for any other cause, they disappear for a year at least, she must observe *Iddat*¹ until three months after her change of life, that is, after she has reached the age of fifty-five years, which is fixed as the age at which a woman ceases to menstruate.

How change
of life
affects *Iddat*

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 653.

Zaidu-nil-Ambani, Vol. 1, p. 433 ; Clavel, Vol. 1, p. 356.

Art. 315. Where a woman has forgotten the time of her courses by reason of an unceasing menstrual discharge, she must wait seven months before re-marrying, counting from the date of repudiation.

Where a
woman must
observe
Iddat for
seven
months.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 653.

Zaidu-nil-Ambani, Vol. 1, p. 435 ; Clavel, Vol. 1, p. 356.

Art. 316. The period of *Iddat* of a pregnant woman ends with delivery, provided the child when born is partly formed. This is the case whether the retirement was consequent upon her husband's death, or upon dissolution of the marriage by repudiation.

Iddat of a
pregnant
woman.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 654, 655.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 12, p. 128 ; Zaidu-nil-Ambani, Vol. 1, p. 435.

See Sale's Koran, Chap. LXV, p. 454.

¹ See Art. 310.

Iddat for a widow.

Art. 317. The period of *Iddat*¹ for a widow who is not pregnant and whose marriage remains valid until her husband's death, is four months and ten days, whatever may be her age, her religion, or the circumstances of her marriage, and whether the latter was consummated or not.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 654, 655.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 12, p. 129 ;
Zaidu-nil-Ambani, Vol. 1, p. 439.

See Sale's Koran, Chap. 11, p. 26.

Marriage with a woman within four months and ten days from her husband's death is invalid—Dec., Mad. S. D. A., 157 (1855).

Where husband dies during wife's *Iddat*, consequent upon a revocable repudiation.

Art. 318. Where a husband has repudiated his wife under a revocable form² of repudiation and dies before the end of the period prescribed for her *Iddat*, such *Iddat* is cancelled and the woman must commence a fresh *Iddat* for widowhood, whether the repudiation occurred while the husband was in good health or during his last illness.

Notes.

Radd-ul- Muhtâr, Vol. 2, p. 656.

Zaidu-nil-Ambani, Vol. p. 440.

Where wife against her will is repudiated under an irrevocable form during her husband's last illness.

Art. 319. Where during his last illness, the husband repudiates the wife against her will under an irrevocable form,³ and dies during the wife's *Iddat*, thus admitting her to his succession, she is bound to observe the longer of the two periods of *Iddat* consequent upon repudiation or widowhood, which is four months and ten days, during which she must be subject to three full periods of her courses.

¹ See Art. 310.

² See Art. 227.

³ See Art. 239.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 656.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 12, p. 129 ;
Zaidu-nil-Ambani, Vol. 1, p. 436..

Art. 320. Where a husband, after repudiating his wife under an imperfect irrevocable form, contracts a new marriage with her during her *Iddat*, and then repudiates her a second time, he is liable to her for a full dower, and she must commence a fresh retirement.

Effects of
re-marriage
during
Iddat.

Notes.

Radd-ul Muhtâr, Vol. 2, p. 665.

Zaidu-nil--Ambani, Vol. 1 p. 440.

Art. 321. *Iddat* legally commences from the date of repudiation when the marriage is valid, or from the date of the decree annulling the marriage, or from the date of the voluntary separation of the parties, when the marriage is radically void, or from the day of the husband's death.

Date from
which *Iddat*
commences.

When the wife does not become acquainted with the fact of her repudiation or her husband's death until after the periods prescribed for *Iddat* have expired, she is released from the necessity of observing *Iddat* and is free to marry a second time.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 661, 662, 663 ;
Bahrr-ul-Rayek, Vol. 4, pp. 157, 158.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 12, p. 131 ; Zaidu-nil-Ambani. Vol. 1, p. 442 ; Clavel, Vol. 1, p. 197.

Place in
which *Iddat*
must be ob-
served.

Art. 322. *Iddat* whether consequent upon repudiation or widowhood, must be observed in the husband's house.

Where repudiation or the husband's death occurred, while the wife was away from the husband's house, she must return to it immediately, nor must she leave it unless obliged to do so, unless she cannot pay the rent, or the house ceases to be habitable, or she has good reason for fearing that her property may be lost if she remain in her husband's house.

In the event of any of these cases occurring, the widow is at liberty to remove to some neighbouring dwelling, and the repudiated wife to some dwelling in the locality indicated by the husband. The repudiated wife should only leave her lodging in case of necessity. The widow can go out to procure what is necessary, but must not pass the night away from the house.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 672, 673, 674.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 12, p. 133 ; Zaidunil-Ambani, Vol. 1, p. 444.

See Sale's Koran, Chap. LXV, p. 454.

Cases in
which *Iddat*
is not in-
cumbent.

Art. 323. *Iddat* is not incumbent on the wife repudiated before actual or presumed consummation of the marriage, nor upon the wife whose marriage is radically void, and has been cancelled after a mere retirement,¹ however regular, with the husband.

Notes.

Bahrr-ul-Rayek, Vol. 4, p. 139.

Baillie, Bk. 3, Chap. 12, p. 350 ; Zaidunil-Ambani, Vol. 1, p. 437.

See Sale's Koran, Chap. XXXIII, p. 348.

¹ See Art. 82.

SECTION II.—WOMEN ENTITLED TO MAINTENANCE DURING
THE PERIOD OF IDDAT.

(Arts. 324—331.)

Art. 324. No dissolution of marriage, proceeding from the husband, releases him from the obligation to pay for the wife's maintenance during her period of *Iddat*, however long its duration. Thus, in the following cases the wife, during *Iddat*, is entitled to maintenance :—

Cases in which wife is entitled to maintenance during *Iddat*.

1. When, pregnant or not, she is repudiated¹ under a revocable or irrevocable, imperfect or perfect form.

2. When the marriage is dissolved by reason of an oath of imprecation,² or a vow of continence,³ or when the wife is repudiated in *Khula* form,⁴ unless at the time of such *Khula* repudiation she renounces her right to maintenance.

3. When, after conversion to Islam,⁵ she is separated from her husband, consequent upon her husband's refusal to accept that faith.

4. When the husband on attaining puberty, exercises his right of option⁶ and dissolves the marriage.

5. When the marriage is dissolved by reason of her husband's apostasy.⁷

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 726, 727 ; Bahrr-ul-Rayek, Vol. 4, p. 217 ; Fatawa-i-Kazi Khan, Vol. 1, p. 200.

Baillie, Bk. 6, Chap. 1, p. 450 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 3, pp. 145, 146 ; Zaidunil-Ambani, Vol. 1, p. 448 ; Clavel, Vol. 1, p. 262.

¹ See Art. 217.

² See Art. 335.

³ See Art. 245.

⁴ See Art. 273.

⁵ See Art. 126.

⁶ See Arts. 48, 49.

⁷ See Art. 303.

According to Mahomedan law a marriage is accounted to subsist during the period of *Iddat* with respect to various of its effects, such as obligation of alimony, residence, and so forth ; and hence it may be lawfully accounted to continue in force with respect to the woman's inheritance, but as soon as the *Iddat* is accomplished, a further procrastination is impossible, because the marriage does not then continue in any shape whatever. Where, therefore, a man repudiates his wife, her subsistence and lodging are incumbent upon him during the term of *Iddat*, whether the repudiation be of revocable or irrevocable kind—In the matter of *Din Muhammad*, I. L. R., 5 All., 226, *per* Mahmood, J. (1882).

See *Shah Abu Ilyas v. Ulfat Bibi*, I. L. R., 19 All., 50 (1896) ; Section 488 of the Code of Criminal Procedure (Act V of 1898).

Cases where wife does not lose her right to maintenance after dissolution of marriage.

Art. 325. Where a marriage is dissolved and the wife is in no way to blame for the dissolution, she does not lose her right to maintenance. Consequently during the wife's *Iddat*, after a dissolution of marriage, consequent upon her exercise of the right of option¹ at puberty, the husband is obliged to provide his wife with maintenance. This is also the case when the marriage is dissolved by reason of the inferiority of dower² or by reason of the husband's inequality or impotency.³

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 726 ; Fatawa-i-Alam-giri, Vol. 2, p. 175.

Baillie, Bk. 6, Chap. 1, p. 450 ; Zaidunil-Ambani, Vol. 1, p. 451.

Cases where wife forfeits her right to maintenance during *Iddat*.

Art. 326. A wife forfeits her right to maintenance during the period of her *Iddat*,⁴ when she is to blame for the dissolution of the marriage. Thus, maintenance is not due to the wife when, after real or presumed consummation, the marriage is dissolved on account of

¹ See Arts. 48, 48.

² See Art. 52.

³ See Art. 298.

⁴ See Art. 310.

her apostasy.¹ She is entitled only to a residence, provided she does not leave the same during her *Iddat*.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 175; Radd-ul-Muhtâr, Vol. 2, pp. 726, 727.

Baillie, Bk. 6, Chap. 1, p. 451; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 3, pp. 145, 146; Zaidunil-Ambani, Vol. 1, p. 452.

Art. 327. Where a marriage is dissolved and the wife is to blame for its dissolution, she loses her right to maintenance and cannot recover it even when the cause which led to the dissolution has ceased to exist. Thus, if a wife apostatizes and returns to Islam during her *Iddat*,¹ her return does not entitle her to maintenance. Nevertheless a wife, repudiated for being rebellious,² can claim maintenance if she returns to her husband's house.

Where wife loses her right to maintenance for having changed her religion.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 175.

Baillie, Bk. 6, Chap. 1, pp. 451, 453; Zaidunil-Ambani, Vol. 1, p. 453.

Art. 328. A child wife who has not yet attained puberty and who commences an *Iddat* by months, but becomes subject to menstruation before the period is completed, receives maintenance during the additional *Iddat*, which she is obliged to observe for the three full periods of her courses. The same applies to a wife who during the period of *Iddat*, passes two periods of her courses, but then ceases to menstruate owing to illness or any other cause. Should the courses re-appear before her change of life, she is entitled to

Other cases where wife is entitled to maintenance.

¹ See Art. 310.

² See Art. 171.

maintenance until three menstrual periods have expired.

Notes

Fatawa-i-Alamgiri, Vol. 2, p. 175 ; Fatawa-i-Kazi Khan, Vol. 1, p. 200.

Zaidu-nil-Ambani, Vol. 1, p. 454.

Where maintenance has not been fixed by judge.

Art. 329. A wife whose maintenance has not been fixed by the judge or by her husband, forfeits her right to maintenance, if she does not lay claim to it during the period of her *Iddat*,¹ or within one month of its expiry.

Notes.

Fatawa-i-Kazi Khan, Vol. 1, p. 201.

Baillie, Bk. 6, Chap. 1, p. 452 ; Zaidu-nil-Ambani, Vol. 1, p. 455.

Where maintenance is fixed by mutual agreement.

Art. 330. Where the wife is in *Iddat*,¹ the maintenance, if fixed by an order of the judge or by mutual agreement, is not lost when the period of *Iddat* expires without any claim having been made.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 726.

Zaidu-nil-Ambani, Vol. 1, p. 456.

Widow is not entitled to maintenance.

Art. 331. A widow is not entitled to maintenance, even though she is pregnant.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 175 ; Radd-ul-Muhtâr, Vol. 2, p. 726.

Baillie, Bk. 6, Chap. 1, p. 452 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 4, s. 2, p. 145 ; Zaidu-nil-Ambani, Vol. 1, p. 457 ; Clavel, Vol. 1, p. 362.

¹ See Art. 310.

BOOK IV

CHILDREN.

(Arts. 332—434.)

CHAPTER I.

PATERNITY AND FILIATION.

(Arts. 332—364.)

SECTION I.—CHILDREN BORN OF A VALID MARRIAGE.

(Arts. 332—340.)

Art. 332. The shortest period of gestation recognised by law is six months, the longest is two years and the usual period is nine months.

Recognised
period of
gestation.

Notes.

Sharh-i-Vikaya, Vol. 2, p. 152.

Baillie, Bk. 5, Chap. 1, pp. 390, 393 ; Zaidunil-Ambani, Vol. 2, p. 3 ; Clavel, Vol. 1, p. 272.

See Sale's Koran, Chap. XXXI, p. 336, and Chap. XLVI, p. 408 ; Section 112 of the Indian Evidence Act (I of 1872).

Art. 333. When a child is born six full months at least after the celebration of a valid marriage, the paternity is established from the husband, but the paternity of a child, born within six months of the celebration of the marriage, is only established from the husband when he formally acknowledges the child.

Child born
six full
months from
the date of a
valid mar-
riage.

Notes.

Sharh-i-Vikaya, Vol. 2, pp. 143, 150, 151.

Baillie, Bk. 5, Chap. 1, pp. 390, 391 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 13, p. 137 ; Zaidunil-Ambani, Vol. 2, p. 4.

See Notes to Art. 350.

Where husband denies legitimacy of a child born after six full months from date of marriage.

Art. 334. Should the husband deny the legitimacy of the child which his wife bears after six full months of marriage, the child is not to be held illegitimate, unless such denial is made under the conditions laid down in the following Articles, and until the husband and wife have appeared before a judge and have taken the oath against each other, upon which the judge has made an order for their separation.

Notes.

Sharh-i-Vikaya, Vol. 2; pp. 143, 150.

Baillie, Bk. 3, Chap. 10, pp. 334, 336 ; Zaidunil-Ambani, Vol. 2, p. 5.

See the Indian Oaths Act (X of 1873).

Conditions necessary for husband and wife to demand oath of *lian*.

Art. 335. To enable both husband and wife to demand the oath of *lian* or imprecation, the following conditions are necessary :—

The marriage must have been validly contracted and must still subsist, or if it is dissolved, the dissolution must have taken place under a revocable form¹ and the wife's period of *Iddat*² must not have expired. The husband and wife must both be capable of actually giving testimony before a judge, that is, to say, they must both be Muslims, of sound mind, adult, not dumb, and must not have been fined or have suffered corporal punishment for a penal offence ; lastly, it is necessary that the wife hitherto has borne a virtuous character.

¹ See Art. 217.

² See Art. 310.

If, while fulfilling these conditions, both husband and wife comply with the formalities necessary for the oath the judge will immediately pronounce their separation, declare the child illegitimate and order it to be left in the mother's custody.

If the married parties refuse to take the oath, or if both or one of them should be incapable of taking it, the paternity of the child shall in all cases be established from the husband. Where the husband retracts before or after taking the oath or before judicial separation takes place, he is liable to a fine or imprisonment, and the judge will declare the child legitimate.

Notes.

Umdat-ul-Riyah, p. 126 ; Fatawa-i-Alamgiri, Vol. 2, pp. 151, 152, 153 ; Sharh-i-Vikaya, Vol. 2, p. 126 ; Hidayah, Vol. 2, p. 399 ; Radd-ul-Muhtâr, Vol. 2, pp. 637, 640.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 10, pp. 123-125 ; Zaidunil-Ambani, Vol. 2, p. 8.

Art. 336. A husband, in accordance with the custom of the locality, can only disown a child, either on the day of his birth, or at the time of purchasing the articles necessary in view of its birth, or during the period of rejoicing. On the other hand if the husband is absent, he must disown the child immediately he is informed of its birth.

Where husband can disown a child.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 641.

Baillie, Bk. 3, Chap. 10, pp. 339, 340 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 10, p. 126 ; Zaidunil-Ambani, Vol. 2, p. 5 ; Clavel, Vol. 1, p. 274.

Cases where a child cannot be held illegitimate even after husband and wife have been judicially separated.

Art. 337. In the following cases, a child is not declared illegitimate, even though the husband and wife have complied with the formalities necessary for the oath of imprecation, and the judge has pronounced their separation :—

1. When the child is disowned after expiry of the prescribed periods.

2. When the child is disowned after having been formally or tacitly acknowledged by the husband.

3. When the child dies before the decree of separation, whether it is disowned before or after its death, or before or after the oath has been taken.

When, after judicial separation and declaration of child's illegitimacy, the wife bears another child conceived at the same time. In this case the paternity of both the twins is established from the husband, and the declaration of illegitimacy is cancelled.

5. When the child is disowned after a judicial decree establishing its paternity.

6. When either husband or wife should die, after the child is disowned but before the decree of separation.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 640.

Baillie, Bk. 3, Chap. 10, pp. 340 ; 342 ; Zaidunil-Ambani, Vol. 2, p. 6 ; Clavel, Vol. 1, p. 275.

Legal status of illegitimate child.

Art. 338. A child declared illegitimate by the judge is excluded from all right of inheritance, and forfeits its right to maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 642, 643.

Baillie, Bk. 3, Chap. 10, p. 342 ; Zaidunil-Ambani, Vol. 2, p. 10.

See Section 488 of the Code of Criminal Procedure (Act V of 1898).

Art. 339. Where a father acknowledges the child of his dead and disowned son, such acknowledgment is valid, and the father, though liable to a judicial penalty, can inherit from his son.

Where father acknowledges child of his dead and disowned son.

The acknowledgment of the child of a dead and disowned daughter, is not valid, and the father cannot inherit from the daughter.

Notes.

Bahrr-ul-Rayek, Vol. 4, p. 130.

Zaidu-nil-Ambani, Vol. 2, p. 12.

Art. 340. Separation consequent upon a reciprocal oath of *lian*, constitutes an irrevocable repudiation.¹

Effect of separation consequent upon oath of *lian*.

The marriage is deemed to exist until the judge has pronounced the separation of the married parties, and should one die before the order is pronounced, the other, if capable, would inherit from the deceased : but the husband who has demanded the oath of *lian* is forbidden to have any communication or dealings with his wife.

So long as they remain capable of giving testimony before a judge, the husband and wife whose marriage has been dissolved by a reciprocal oath cannot marry each other again. If both, or either of them, should lose the capacity to give such testimony, their union would be lawful whether it takes place during or after the period of the wife's *Iddat*.

Notes.

Bahrr-ul-Rayek, Vol. 4, pp. 130, 131 ; Radd-ul-Muhtâr, Vol. 2, pp. 639, 640 ; Hidaya, Vol. 2, p. 379.

Baillie, Bk. 3, Chap. 10, pp. 335, 337, 342 ; Zaidu-nil-Ambani, Vol. 2, p. 12 ; Clavel, Vol. 1, 240.

¹ See Art. 239.

SECTION. II.—CHILDREN BORN OF A VOID MARRIAGE.

(Arts. 341-343.)

Paternity of a child born before parties are separated in a marriage radically void.

Art. 341. When a wife, whose marriage is radically void, bears a child before voluntary or judicial separation, and at a date full six months after marriage, counting from the consummation and not from its celebration, paternity is established from the husband, even without his formal acknowledgment and without his being able to disown the child.

Where the child is born after judicial or voluntary separation, paternity cannot be established from the husband, unless it is born within the period of two full years from the annulment of the marriage.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 381, 676.

Baillie, Bk. 3, Chap. 10, p. 340 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 13, p. 136 ; Zaidul-nil-Ambani, Vol. 2, p. 14.

See Section 112 of the Indian Evidence Act (I of 1872).

Paternity of a child born of cohabitation by mistake.

Art. 342. Where a child, born after cohabitation by mistake, arising either in respect of the wife's lawfulness, or by reason of a defect in the marriage contract, is acknowledged, it is legitimate.

Notes.

Bahrr-ul-Rayek, Vol. 4, p. 172 ; Umdat-ul-Riaya, Vol. 2, p. 145 ; Radd-ul-Muhtâr, Vol. 2, p. 677.

Zaidul-nil-Ambani, Vol. 2, p. 15.

Paternity of a child born of a seduced woman.

Art. 343. Where a woman, pregnant by illicit intercourse is married by her seducer, the paternity of the child, if born at least six full months from the

date of the marriage,¹ is established from the husband, who cannot disown it.

If the child is born within the above mentioned period, the paternity is not established from the husband unless he acknowledges the child, without declaring it to be illegitimate.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 165.

Zaidu-nil-Ambani, Vol. 2, p. 17.

SECTION III.—CHILDREN BORN TO REPUDIATED WIVES, OR TO WIDOWS.

(Arts. 344—347.)

Art. 344. When an adult wife repudiated under a revocable form² bears a child before having announced the termination of her *Iddat*,³ the paternity of the child is established from the husband. Where the marriage was dissolved under an irrevocable form of repudiation,⁴ imperfect or perfect, and the wife, without having announced the termination of her *Iddat*, bears a child, paternity is established from the husband, without his acknowledgment being necessary and without his being able to disown the child.

Paternity of a child born of a woman observing *Iddat* consequent upon a revocable repudiation.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 676, 677, 678.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 13, pp. 134, 135 ;
Zaidu-nil-Ambani, Vol. 2, p. 18.

Art. 345. Where a widow, or a wife repudiated under any form of repudiation⁵ whatever, has announced the termination of *Iddat*,⁶ and the announcement in each

Paternity of a child born of a widow observing *Iddat* or a repudiated wife.

¹ See Art. 333.

² See Art. 227.

³ See Art. 310.

⁴ See Art. 239.

⁵ See Art. 217.

⁶ See Art. 310.

instance, is justified by the time elapsed since the dissolution of the marriage, the paternity of a child born by either woman, is established, provided that the child is born within six full months of the said announcement, or within two years of the dissolution of the marriage.

Should, however, the birth take place within six months of the announcement, but at the end of, or after, two years from the dissolution of the marriage, the paternity cannot be established either from the deceased or the repudiating husband.

Notes.

Radd-ul Muhtâr, Vol. 2, pp. 678, 679.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 13, p. 136 ; Zaidunil-Ambani, Vol. 2, p. 20. •

See Section 112 of the Indian Evidence Act (I of 1872).

Case of
young wife
not subject
to menstrua-
tion who be-
comes preg-
nant during
Iddat.

Art. 346. Where a young wife, before being subject to menstruation, is repudiated after consummation of the marriage and, not having declared herself to be pregnant at the time of repudiation or announced that her *Iddat*¹ has terminated, bears a child within a period of nine full months from the day of her repudiation², the child is held to be legitimate ; but this is not so if the child is born at the end of, or after, nine full months.

Where, however, she has announced the termination of her *Iddat*, and bears a child within six full months of the said announcement and within nine months of her repudiation, the paternity of the child is established from the husband, but this is not so when the child is born at the end of, or after, six full months from the said announcement.

¹ See Art. 310.

² See Art. 217.

And where before menstruation, she claims to be pregnant at the time of repudiation and bears a child, paternity shall be established from the husband if the child is born within two years of the dissolution of marriage under an irrevocable form,¹ or within the twenty-seven months of its dissolution under a revocable form.²

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 677, 678.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 13, p. 135 ;
Zaidu-nil-Ambani, Vol. 2, p. 21.

Art. 347. Where, before menstruating the young wife is left a widow and not having declared herself pregnant at her husband's death, bears a child before having announced the termination of her *Iddat*, the paternity is established from the deceased husband, provided the child is born within a period of ten months and ten days from the husband's death, but this is not so if the child is born at the end of, or after, that period.

Where a young wife not subject to menstruation becomes a widow, and bears a child within ten months and ten days of her husband's death.

If, however she claims at her husband's death to be pregnant, the paternity of the child she bears is established from the deceased husband, provided the child is born within the period laid down in the preceding Article.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 678 ; Fatawa-i-Alam-giri, Vol. 2, pp. 163, 164.

Zaidu-nil-Ambani, Vol. 2, p. 21.

See Section 112 of the Indian Evidence Act (I of 1872).

¹ See Art. 239.

² See Art. 227.

SECTION IV.—PROOF OF BIRTH, ACKNOWLEDGMENT OF
PATERNITY, FILIATION, AND FRATERNITY.

(Arts. 348—355.)

Where a married woman claims to have given birth to a child.

Art. 348 When, during the subsistence of the marriage, a married woman claims to have given birth to a child, whose birth or identity is denied by the husband, the testimony of a trustworthy Muslim midwife is sufficient to establish its birth and identity.

Notes.

Hedayah, Vol. 2, p. 412 ; Bahrr-ul-Rayek, Vol. 4, pp. 175, 176.

Baillie, Bk. 5, Chap. 1, p. 389 ; Chap. 2, p. 407 ; Hamilton's Hedayah, Vol. 3, Bk. 24, Chap. 5, p. 426 ; Zaidunil-Ambani, Vol. 2, p. 24 ; Clavel, Vol. 1, p. 284.

See Section 112 of the Indian Evidence Act (1 of 1872).

When a woman observing *Iddat* asserts that she bore a child within two years.

Art. 349. While observing *Iddat*,¹ either consequent upon her husband's death or upon a revocable² or irrevocable³ repudiation, if a woman asserts that she bore a child within two years of the dissolution of the marriage, and the birth is denied by the husband or his heirs, such birth can only be proved by the declaration of two trustworthy male witnesses or by that of one male witness and two female witnesses of good reputation, unless the husband or his heirs had previously admitted that the woman was pregnant or unless the signs of pregnancy were plainly manifest.

¹ See Art. 310.

² See Art. 227.

³ See Art. 239.

Notes.

Tahtavi, Vol. 2, p. 235 ; Radd-ul-Muhtâr, Vol. 2, pp. 679, 680.

Baillie, Bk. 5, Chap. 2, p. 407 ; Hamilton's Hedayah, Vol. 3, Bk. 24, Chap. 5, p. 426 ; Zaidunil-Ambani, Vol. 2, p. 25 ; Clavel, Vol. 1, p. 284.

Art. 350. When a man acknowledges as his son, a child of unknown parentage, and the difference between their ages renders the relationship possible, the man's declaration is by itself sufficient to establish the paternity, whether or not the child gives its formal consent having reached the age of reason,¹ or whether the acknowledging party makes the declaration while in a state of good health, or during his last illness.

Where a man acknowledges as his son a child of unknown parentage.

Such acknowledgment produces the same effects as does lawful paternity, and entitles the child so acknowledged to maintenance and to paternal care, and gives it the right to a share with the other heirs in the estate of the person who acknowledges it, and in that of the latter's father, even though the latter and the other heirs do not acknowledge the child's filiation.

If, after acknowledging a child, the man dies and the child's mother claims to have been his wife and that the child was born of their marriage, she is entitled to her lawful share in the estate of the deceased, provided always that its maternity is established and that the woman is a Muslim.

But if the heirs do not acknowledge her as their father's wife, or if they dispute the fact of her being a Muslim, she cannot inherit unless she can establish her claim by trustworthy evidence.

¹ See Art. 565,

The same rule will apply if either the maternity of the child or the woman's faith is unknown, even though the heirs offer no opposition.

Notes.

Bahrr-ul-Rayek, Vol. 7, p. 278 ; Radd-ul-Muhtâr, Vol. 4, pp. 151, 512.

Baillie, Bk. 5, Chap. 2, pp. 405, 408, 409, 410 ; Hamilton's Hedayah, Vol. 3, Bk. 25, Chap. 3, p. 489 ; Zaidunil-Ambani, Vol. 2, p. 27 ; Clavel, Vol. 1, p. 283.

Where a Mahomedan cohabited with a woman as man and wife, and recognised a girl as his, according to Mahomedan law, such child is entitled to inheritance, provided her parentage be not commonly imputed to another—*Khairat Ali v. Zahuran*, 5 Sel. Rep., S. D. A., 19 (1830).

Where there is a clear and open declaration of paternity, the *onus* of showing that marriage was impossible is on the other side. An acknowledgment of paternity will itself raise the presumption of marriage between the person who makes it and the mother of the child—*Rook Begum v. Walagowhur Shah*, 3 W. R., 187 (1865).

Mahomedan law is scrupulous in bastardizing the issue of any connection, in which it can be shewn by presumption that there has been cohabitation and acknowledgment of paternity—*Roshun Jahan v. Syed Enaet Hossein*, 5 W. R., 4 (1866).

The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child ; but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate. A child born out of wedlock is illegitimate ; if acknowledged he acquires the status of legitimacy under Mahomedan law. Where, therefore, a child really illegitimate by birth becomes legitimated, it is by force of acknowledgment, express or implied, directly proved or presumed—*Ashrufodd Dowlah v. Hyder Hossein*, 11 M. I. A., 94 (1866).

The acknowledgment of a Mahomedan child confers on it the status of a legitimate son, and on its mother to whom the

declaration also extends that of a lawful wife—*Wise v. Sundaloonissa*, 7 W. R., 13, P. C. (1867).

According to Mahomedan law the acknowledgment of the father renders the son or daughter a legitimate child and an heir, unless it is impossible for the son or daughter to have been so—*Oomda Beebee v. Syud Shah Jonab*, 5 W. R., 132, *per* Peacock, C. J. (1866).

Where a Mahomedan acknowledges a person to be his daughter, he must be taken to mean his legitimate daughter unless the contrary appears—*Fuzeelun Beebee v. Omdah Bebee*, 10 W. R., 469 (1868).

An acknowledgment of a child is valid, *first*, when the age of the parties admits of the party acknowledged being born of the acknowledger; *secondly*, when the descent of the acknowledged has not been established from another; and *thirdly*, when the acknowledged, supposing it able to give an account of itself, confirms the acknowledger in his acknowledgment. A child, therefore, born out of wedlock, if acknowledged, acquires the status of legitimacy—*Nujeeb-oonissa v. Zumeerun*, 11 W. R., 426, *per* Kemp, J. (1869).

An acknowledgment by a Mahomedan father renders a son or daughter a legitimate child and heir—*Wuheedun v. Wusee Hossein*, 15 W. R., 403 (1871).

The legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances, without proof either of marriage between the parents or of any formal act of legitimation—*M. Ismal Khan v. Fidayat-un-Nissa*, I. L. R., 3 All., 723 (1881).

Where a Mahomedan lived and cohabited with a woman, and a son was born in his house, who was acknowledged and recognised by him as his son, held, that such acknowledgment gave the son the status of an heir capable of inheriting as being of legitimate birth—*M. Azmat Ali Khan v. Lalli Begum*, I. L. R., 8 Cal. 422; L. R., 9 I. A., 8 (1881).

The acknowledgment and recognition of children by a Mahomedan as his sons gives them the status of sons capable of inheriting as legitimate sons—*Sadakat Hossein v. Mahomed Yusuf*, I. L. R., 10 Cal., 663; L. R., 11 I. A., 31 (1883); *Muhammad Allahadad v. Muhammad Ismail*, I. L. R., 8 All., 234, *per* Petheram, C. J. (1886).

According to Mahomedan law a child really illegitimate by birth, becomes legitimated by force of an acknowledgment, expressed or implied, directly proved or presumed—*Abdul Razak v. Aga Mahomed Jaffar Bindanim*, I. L. R., 21 Cal., 666 ; I. R., 21 I. A., 56 (1893).

See *Jeswunt Sing v. Jet Sing*, 3 M. I. A., 245 (1844) ; *Mahomed Reza v. Inait Razza*, S. D. A., Dec. Beng. 18 (1848) ; *Waliullah v. Miran Sahib*, 2 Bom. H. C. R., 285, *per Couch*, C. J. (1864) ; *Mahtala Bibee v. Haleemoozooman*, 10 C. L. R., 293 (1881) ; *Dhan Bibi v. Lalon Bibi*, I. L. R., 27 Cal., 801 (1900).

Where there is no evidence of treatment tantamount to acknowledgment of children, it is impossible to distinguish the cohabitation from a cohabitation between a man and his concubine—*Masit-un-nissa v. Pathani*, I. L. R., 26 All., 295 (1904).

The doctrine of acknowledgment is not applicable to a case in which the paternity of a child is known, and it cannot be called in to legitimize a child which is illegitimate by reason of the unlawfulness of the marriage of its parents—*Azizunnissa Khatoon v. Karimunnissa Khatoon*, I. L. R., 23 Cal., 130 (1895).

See *Liaqat Ali v. Karimunnissa*, I. L. R., 15 All., 396, (1893) ; *Dhan Bibi v. Lalon Bibi*, I. L. R., 27 Cal., 801 (1900).

Unless there is an absolute bar or impediment to a valid marriage, acknowledgment has the effect of legitimation where either the effect of the marriage or its exact time with reference to the legitimacy of the child's birth, is a matter of uncertainty. There can be no doubt that the doctrine of acknowledgment is an integral portion of Mahomedan family law, and the conditions under which it will take effect must be determined with reference to Mahomedan jurisprudence, rather than the Evidence Act—*Fazilatunnissa v. Kamarunnissa*, 9 C. W. N. 352 (1904).

See *Nujmooddeen v. Zuhooran*, 10 W. R., 45 (1868) ; *Ashruf Ali v. Ashad Ali*, 16 W. R. 260 (1871) ; *Nabokant Roy v. Mahatala Bibee*, 20 W. R. 164 (1873) ; *Butoolun v. Koolsom*, 25 W. R. 444 (1876).

See section 50 of the Indian Evidence Act (I of 1872) ; Notes to Art. 148.

Art. 351. Where a woman who is neither married nor observing *Iddat*¹, acknowledges as son, a child of unknown parentage whose age renders such relationship possible, her acknowledgment shall be recognised in so far as she is personally concerned, whether or not the child gives its formal consent to the acknowledgment on reaching the age of reason.²

Where a woman acknowledges a child of unknown parentage.

This acknowledgment entitles the mother and the child so acknowledged to inherit from each other provided they have no other heirs.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 512.

Baillie, Bk. 5. Chap. 2, p. 407; Zaidunil-Ambani, Vol. 2, p. 28, Clavel, Vol. 1, p. 284.

Art. 352. Where a child, of either sex, and of unknown parentage, acknowledges a man as father or a woman as mother, and if the difference in the respective ages renders the relationship possible, the child's declaration, supported by the formal assent of the party acknowledged, is sufficient to establish the paternity or maternity as the case may be. Such an acknowledgment renders the child liable for the performance of all the duties due towards a father or a mother, and makes it binding upon either of the latter as the case may be, to provide for the child's maintenance, to watch over its education, and to fulfil the other duties incumbent on parents.

Where child of either sex acknowledges a man as father or a woman as mother.

On the death of either parent or child, the survivor is entitled to his or her share in the estate of the deceased.

¹ See Art. 310.

² See Art. 565.

Notes.

Durrul-Mukhtâr, Vol. 3, p. 87.

Baillie, Bk. 5, Chap. 2, p. 405 ; Hamilton's Hedayah, Vol. 3, Bk. 25, Chap. 3, p. 439 ; Zaidu-nil-Ambani, Vol. 2, p. 30.

Where a man acknowledges another man as brother.

Art. 353. The acknowledgment of a man, whose parentage is unknown, as brother, is only binding on the acknowledging party and does not affect the latter's brothers or other co-heirs.

Notes.

Hidaya, Vol. 3, pp. 228, 229 ; Radd-ul-Muhtâr, Vol. 4, pp. 512, 513.

Baillie, Bk. 5, Chap. 2, p. 406 ; Hamilton's Hedayah, Vol. 3, Bk. 25, Chap. 8, p. 440 ; Zaidu-nil-Ambani, Vol. 2, p. 30 ; Clavel, Vol. 1, p. 225.

See *Shahebzadi Begum v. Himmud Bahadur*, 4 B. L. R., A.C., 103 (1869) ; 13 B. L. R., 182, P. C. (1873).

A child of known parentage cannot be validly acknowledged.

Art. 354. A child of known parentage cannot be validly acknowledged. Such an acknowledgment does not entail the obligation of paying costs of *Hazanah*¹, nor does it create prohibition of marriage, nor on the death of one party does the survivor inherit from the deceased.

Notes.

Hidaya, Vol. 3, p. 227.

Zaidu-nil-Ambani, Vol. 2, p. 32 ; Clavel, Vol. 1, pp. 286, 288.

See Sale's Koran, Chap. XXXIII, p. 341.

Testimony necessary to establish relationship.

Art. 355. Paternity, filiation, fraternity and all other relationship can be established by the testimony of two trustworthy male witnesses, or by that of one male and two female witnesses.

¹ Or custody of the child, See Art. 380.

Notes.

Zaidu-nil-Ambani, Vol. 2, p. 33.

See Sections 50, 51 of the Indian Evidence Act (I of 1872).

SECTION V. FOUNDLINGS (LAKEET).

(Arts. 356—564.)

Art. 356. An abandoned child whether illegitimate or not, deserves the compassion of its fellow creatures, and whosoever finds such a child and leaves it to its fate or, after receiving and sheltering it, subsequently abandons it, fails in his duty.

A foundling when discovered should be taken care of.

Notes.

Radd-ul-Muhtâr, Vol. 3, pp. 341, 342.

Hamilton's Hedayah, Vol. 2, Bk. 10, p. 206 ; Zaidu-nil-Ambani, Vol 2, p. 35.

Art. 357. Every foundling is held to be a Muslim even when found by a person who is a non-Muslim, unless it is discovered in a quarter exclusively inhabited by Jews or Christians.

Every foundling is held to be a Muslim except when found in a Christian or Jewish quarter.

Notes.

Radd-ul-Muhtâr, Vol. 3, pp. 342, 345.

Hamilton's Hedayah, Vol. 2, Bk. 10, pp. 206, 237 ; Zaidu-nil-Ambani, Vol. 2, p. 36.

Art. 358. Without lawful reasons, no one, not even a judge, is entitled to remove a foundling from the person who finds and shelters it.

Rights of persons over foundling.

Where two persons of different religious persuasion discover a foundling, preference shall be given to the Muslim. If neither are Muslims and if both claim the child and are of a similar condition in life, the judge will decide to whom the child shall be entrusted.

Notes.

Radd-ul-Muhtâr, Vol. 3, p. 343.

Hamilton's Hedayah, Vol. 2, Bk. 10, p. 206 ; Zaidunil-Ambani, Vol. 2, p. 37.

Property on the foundling is the child's own.

Art. 359. Property found on the child is the child's own. The person sheltering the child, if so authorized, may use a portion of such property for its maintenance ; any sum he himself pays cannot be recovered without an order from the judge.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 345 ; Fatawa-i-Kazi Khan, Vol. 4, p. 359.

Hamilton's Hedayah, Vol. 2, Bk. 10, pp. 206, 207 ; Zaidunil-Ambani, Vol. 2, p. 37.

Responsibilities of a person sheltering a foundling.

Art. 360. Any person sheltering a foundling must educate it and have it taught a suitable trade or profession. Such person is justified in making the child accompany him wherever he goes, and in receiving gifts and remunerations made in the child's favour.

Notes.

Radd-ul-Muhtâr, Vol. 3, p. 345 ; Hedaya, Vol. 2, p. 593.

Hamilton's Hedayah, Vol. 2, Bk. 10, p. 208 ; Zaidunil-Ambani, Vol. 2, p. 38.

Acknowledgment of a foundling that is living.

Art. 361. Where a foundling is acknowledged while alive, a mere declaration is sufficient to establish paternity, even when it is made by a Christian or Jew.

Notes.

Radd-ul-Muhtâr, Vol. 3, pp. 343, 344, 345.

Hamilton's Hedayah, Vol. 2, Bk. 10, pp. 206, 207 ; Zaidunil-Ambani, Vol. 2, p. 39 ; Clavel, Vol. 1, p. 291.

Art. 362. Where two persons, neither of whom originally received and sheltered the child, acknowledge paternity in respect of a foundling, failing proof to the contrary, the prior claim will be admitted.

Where two persons lay claim to a foundling.

Where the two claims are made simultaneously, the claimant who can indicate some distinguishing mark on the child's body, shall have preference, in default of stronger proof by the other party.

Notes.

Radd-ul-Muhtâr, Vol. 3, pp. 343, 344.

Hamilton's Hedayah, Vol. 2, Bk. 10, p. 207; Zaidunil-Ambani, Vol. 2, p. 40.

Art. 363. Where a foundling is acknowledged as her son by a married woman, the maternity can only be established by the husband giving his formal assent to her acknowledgment, or by the woman proving that the child was the issue of her union with the husband. If necessary she can establish the child's identity by the deposition of a midwife.

Where a married woman acknowledges a foundling.

Where a woman is not married, the declaration of two men, or that of one man and two women, is necessary to establish her claim to the maternity of a foundling.

Notes.

Radd-ul-Muhtâr, Vol. 3, pp. 343, 344.

Zaidunil-Ambani, Vol. 2, p. 41.

Art. 364. Where the foundling is destitute and acknowledged by nobody, and where the person who discovers the child will not be burdened with its maintenance and education, and on proof that when it was found nothing was known of its parents, the State¹ becomes responsible for its maintenance and education.

Where a foundling is destitute and acknowledged by nobody, responsibility for its maintenance falls on the State.

¹ *Bail-ul-mal* or public treasury.

Notes.

Radd-ul-Muhtâr, Vol. 3, p. 342.

Hamilton's Hedayah, Vol. 2, Bk. 10, p. 206; Zaidunil-Ambani, Vol. 2, p. 43.

CHAPTER II.

THE DUTIES OF PARENTS TOWARDS THEIR CHILDREN.

(Arts. 365—407.)

Father must educate his children with due regard to his condition in life.

Art. 365. It is the duty of every father to attend to the education of his child, and in accordance with his own condition in life and the child's aptitude, to see that it is taught a trade or profession. He must protect his child's interests, and where it has no means of its own, he is bound to maintain the child, if a boy, until he can earn his own living, if a girl, until she is married.

The mother, on her part, must see that her child is properly cared for, and in certain cases must herself suckle the child.

Notes.

Bahrr-ul-Rayek, Vol. 4, p. 180; Radd-ul-Muhtâr, Vol. 2, p. 732.

Zaidunil-Ambani, Vol. 2, p. 43.

SECTION I.—SUCKLING (RAZAAT)

(Arts. 365—374.)

Art. 366. A mother is bound to suckle her child

in three cases :—

Cases where a mother is bound to suckle her child herself.

1. When neither the father nor the child can afford to pay for a wet-nurse, and no one can be found to suckle the child gratuitously.

2. When no other nurse than the mother is obtainable.

3. When the child refuses to take the breast of any other woman.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 732.

Baillie, Bk. 6, Chap. 2, p. 455 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 4, p. 146 ; Zaidunil-Ambani, Vol. 2, p. 45.

Art. 367. Where a mother refuses to suckle a child and there is no obligation on her part to do so, the father must procure a wet-nurse who will suckle the child at its mother's residence.

Case in which father is bound to provide a wet-nurse.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 732.

Baillie, Bk. 6, Chap. 2, p. 455 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 4, p. 146 ; Zaidunil-Ambani, Vol. 2, p. 46.

Art. 368. A mother who suckles her own child during the subsistence of her marriage with the child's father or during the period of *Iddat*¹ consequent upon a revocable repudiation,² is not entitled to remuneration for so doing. Should, however, a husband engage his wife to suckle his child by another bed, she would be entitled to remuneration.

Where a mother is entitled to remuneration for suckling child.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 733.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 4, p. 146 ; Zaidunil-Ambani, Vol. 2, p. 46.

Art. 369. A wife, who is irrevocably repudiated and who suckles her own child, during the period of *Iddat*¹ consequent upon such repudiation³ by the child's father, is entitled to remuneration.

Suckling during *Iddat*.

¹ See Art. 310.

² See Art. 227.

³ See Art. 239.

Notes

Fatawa-i-Alamgiri, Vol. 2, p. 177.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 4, p. 146 ;
Zaidu-nil-Ambani, Vol. 2, p. 36.

See Sale's Koran, Chap. LXV, p. 55.

Suckling
after expiry
of *Iddat*.

Art. 370. When the period of *Iddat* has expired, the repudiated mother, unless she demands higher remuneration, is entitled to preference over a strange nurse.

When such nurse consents to suckle the child gratuitously or for a salary lower than is customary, while the mother claims the full amount usually paid in such cases, the child will be confided to the strange nurse who must suckle it at its mother's residence.

Notes

Tahtavi, Vol. 2, p. 276 ; Radd-ul-Muhtâr, Vol. 2, pp. 689, 733.

Baillie, Bk. 6, Chap. 2, p. 456 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 4, p. 146 ; Zaidu-nil-Ambani, Vol. 2, p. 47.

Where
mother is
engaged to
suckle her
child.

Art. 371. When a mother who is under no obligation to suckle her child,¹ is engaged to do so, she is entitled to remuneration, even though she has made no actual contract to that effect with the child's father for a period extending to two years.

Notes

Radd-ul-Muhtâr, Vol. 2, p. 734.

Zaidu-nil-Ambani, Vol. 2, p. 48.

See Sale's Koran, Chap. II, pp. 27, 28.

Where re-
muneration
for suck-
ling is com-
pounded
for.

Art. 372. Where remuneration for suckling is compounded for, it is equivalent to a contract for hire.

Where a mother compounds for the suckling of the child by accepting a certain sum of money, such

¹ See Art. 286.

transaction is void if entered into during the subsistence of the marriage or during the period of *Iddat*¹, consequent upon a revocable repudiation²; if entered into during, or subsequent to, *Iddat* consequent upon an irrevocable repudiation³, perfect or imperfect, the transaction is valid, and both the contracting parties must abide by their stipulation.

Notes

Radd-ul-Muhtâr, Vol. 2, p. 734.

Zaidu-nil-Ambani, Vol. 2, p. 49; Clavel, Vol. 1, p. 304.

Art. 373. Remuneration due to the mother for suckling is not lost by the father's death. It constitutes a debt due to the mother, and in respect of which she stands on an equal footing with the other creditors of the estate.

Remuneration for suckling not lost by father's death.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 734.

Zaidu-nil-Ambani, Vol. 2, p. 49.

Art. 374. A hired wet-nurse, upon expiry of her agreement, can be compelled to renew it if the child refuses the breast of any other nurse. She is not bound to reside in the house of the child's mother, unless there be an agreement to that effect.

Where a hired wet-nurse may be compelled to renew her agreement.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 732.

Baillie, Bk. 6, Ch. 2, p. 455; Zaidu-nil-Ambani, Vol. 2, p. 50.

SECTION II.—FOSTERAGE, AND THE IMPEDIMENTS TO MARRIAGE ARISING THEREFROM.

(Arts. 375—379.)

Art. 375. Fosterage creates an impediment to marriage and arises when a child is suckled by a woman other

Fosterage an impediment to marriage.

¹ See Art. 310.

² See Art. 227.

³ See Art. 239.

than its mother before it is two years old, even if suckling takes place after the child is weaned.

One drop of milk sucked by a child from the breasts of a woman or poured into the child's mouth, or injected into its nostrils, provided the drop is swallowed, is sufficient to create an impediment to marriage, even if the milk is drawn from the breast of a dead woman.

Notes.

Tahtavi, Vol. 2, p. 93 ; Radd-ul-Muhtâr, Vol. 2, pp. 436, 437, 438, 439, 443.

Hamilton's Hedayah, Vol. 1, Bk. 3, pp. 67, 70 ; Zaidunil-Ambani, Vol. 2, p. 51.

See Sale's Koran, Chap. II, pp. 27, 28, and Chap. IV, p. 63.

Effects of
suckling as
regards
prohibition
of marriage.

Art. 376. Every woman who suckles an infant, boy or girl, during the two years' period fixed for suckling is regarded in the same light as the child's mother, while her husband is looked upon as the child's father.

All the legitimate children, begotten or to be begotten by the foster mother and by the foster father, shall be regarded as the brothers and sisters of the child to whom the woman acts as wet-nurse.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 437, 438, 439, 442, 446 ; Tahtavi, Vol. 2, p. 96 ; Fatawa-i-Alamgiri, Vol. 2, p. 50.

Hamilton's Hedayah, Vol. 1, Bk. 3, pp. 68, 69, 70 ; Zaidunil-Ambani, Vol. 2, p. 54.

Persons
affected by
fosterage.

Art. 377. Fosterage induces the same impediment to marriage as blood relationship or affinity. Thus a man

is forbidden to marry his foster mother, foster grandmother, foster daughter or foster granddaughter, his full foster sister or his half foster sister, his foster niece either by his paternal or maternal aunt, and the wife of his foster son or of his foster father.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 439, 440, 441, 442.

Hamilton's Hedayah, Vol. 1, Bk. 3, p. 69 ; Zaidû-nil-Ambani, Vol. 2, p. 56.

Art. 378. Where a man has two wives, one adult with whom he has consummated marriage, and the other an infant, and the former suckles the latter, during the two years' period of suckling, both the marriages are thereby annulled and a perpetual impediment is created to a remarriage with either of the women.

Where a man has two wives and one suckles the other

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 444, 445.

Hamilton's Hedayah, Vol. 1, Bk. 3, p. 71 ; Zaidû-nil-Ambani, Vol. 2, p. 62.

Art. 379. Fosterage is proved by the testimony of two men, or of one man and two women of known integrity.

How fosterage is established.

As soon as the impediment is proved, the judge will dissolve the marriage, and order the separation of the married parties. Where the separation takes place before consummation of the marriage, the husband is not liable for dower, but if the marriage has been consummated, the husband pays whichever is the smaller, the stipulated or the proper dower.

During the period of *Iddat*¹ the wife is entitled to neither lodging nor maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 447, 448.

Hamilton's Hedayah, Vol. 1, Bk. 3, p. 72 ; Zaidunil-Ambani, Vol. 2, p. 64.

SECTION III.—HAZANAH OR CUSTODY OF THE CHILD.

(Arts. 380—393.)

A mother is entitled to the custody of her children.

Art. 380. Every mother, provided she fulfils the necessary conditions,² is entitled to the custody of her child, of either sex, during the subsistence of the marriage or after its dissolution, and to bestow upon it such attention as its infant years demand.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 687.

Baillie, Bk. 4, Chap. 2, p. 456 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, p. 138 ; Zaidunil-Ambani, Vol. 2, p. 65 ; Clavel, Vol. 1, p. 317.

See Sections 8, 24 of the Guardian and Wards Act (VIII of 1890). Section 24 is as follows :—

“A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.”

Where a woman was repudiated by her husband, and the repudiation was not revoked, held, that according to Mahomedan law the custody of the infant daughter should remain with her mother until she attained the age of puberty—*Hamid Ali v. Imtiazan*, I. L. R., 2 All., 71 (1878).

¹ See Art. 310.

² See Art. 382.

It is clear according to Mahomedan law, that the mother is of all persons best entitled to the custody of infant children. She forfeits this right on her marrying a stranger—*Beedhun Bibee v. Fuzloollah*, 20 W. R., 411, *per* Kemp, J. (1873).

See *Mohamuddy Begum v. Omdutoonnisa*, 13 W. R., 454 (1870).

Art. 381. Unless the father or the guardian is apprehensive that the child is likely to be taught some other faith than Islam, the mother or any other person entrusted with the custody of the child, even though a Christian woman or a Jewess, is entitled to retain such custody, until the child has attained years of discretion in matters of religion.

Except when there is an apprehension of change of religion.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 693.

Zaidunil-Ambani, Vol. 2, p. 66.

Art. 382. In order to exercise the right of custody in respect of a child, a woman whether she is the mother or a relation, must be adult, of sound mind, trustworthy, virtuous, and in a position to protect the child and watch over its education. She must not be an apostate, nor must she be married to a stranger, unless he be related to the child within the prohibited degrees.¹

Qualifications necessary to exercise the right of custody in respect of a child

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 687, 696.

Zaidunil-Ambani, Vol. 2, p. 66 ; Clavel, Vol. 1, p. 319.

Art. 383. A woman entrusted with the custody of a child, whether she is the child's mother or a relation,

How such right is forfeited.

¹ See Art. 22.

loses her right to such custody if she enters into a marriage contract with a man who is not related to the child within the prohibited degrees.¹ Should she forfeit her right to the custody of a child, this right passes to one of her female relations possessing the necessary qualifications. If no such relation exists, the father or the guardian, can claim the custody of the child ; but the right thus forfeited is revived upon the disappearance of the cause that led to its forfeiture.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 693, 694.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 14, p. 138 ; Zaidunil-Ambani, Vol. 2, p. 67.

The mother loses the right of custody of an infant on her marrying a stranger—*Beedhun Bibee v. Fuzloollah*, 20 W. R., 411, *per* Kemp, J. (1873).

Where a girl, the issue of a Christian marriage, lived under her Christian mother's protection up to the age of fourteen years, and her mother became a Mahomedan and married another man, she was ordered to be removed from the guardianship of her mother, notwithstanding the girl's wish to remain with her mother, and placed under a Christian guardian—*Helen Skinner v. Sophia Evelina Orde*, 10 B. L. R., 125, P. C. (1871).

Discretionary power of Courts to give or refuse to give to the mother the possession of an illegitimate infant discussed—2 Str., 271 (1814).

A divorced Mahomedan mother not shown to be of bad character is entitled to the guardianship of her daughter up to the age of nine years—*Morris Sel. Dec.*, S. A., Bom., Part II, 29 (1849).

A guardian appointed under the will of the putative Mahomedan father of an illegitimate child, has no claim to the custody of such child against the mother—5 Dec. N.-W. P., 39 (1850).

¹ See Art. 22.

A Mahomedan mother has a preferential right to the custody of her married infant daughter over the infant's husband— *Wazeer Ali v. Kaim Ali*, 5 N. W. P., H. C. R., 196. (1872).

Art. 384. In default of the mother, the custody of the child devolves on the mother's maternal line in preference to her paternal line, the nearer relation excluding the more remote. Thus, should the mother to whom in the first place the custody of the child was entrusted, die or marry a stranger, or should she be incompetent to retain custody of the child the right passes to her mother, and failing the mother to the following relations :—

Person entitled to custody of child in default of mother.

The maternal grandmother, the paternal grandmother, full sister, uterine sister, consanguine sister, full sister's daughter, uterine sister's daughter, full maternal aunt, uterine maternal aunt, consanguine maternal aunt, consanguine sister's daughter, brother's daughter, full paternal aunt, full paternal uterine aunt, consanguine paternal aunt, mother's maternal aunt, father's maternal aunt, mother's paternal aunt, father's aunt.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 692.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 14, p. 138 ; Zaidunil-Ambani, Vol. 2, p. 68 ; Clavel, Vol. 1, p. 318.

Art. 385. For the custody of children women are to be preferred to men.

Women are preferred to men.

Failing, however, the abovementioned female relations capable and competent to exercise the right of custody of a child, the right passes to the father's relations

following the order of succession. It thus falls in the first place to the child's father, then to its grandfather, to its full brother, to its consanguine brother, to its full brother's son, to its consanguine brother's son, to its full uncle, and then to its consanguine uncle.

Where in the case of the father's relations there are two of the same degree, preference shall be given to the elder or to the most virtuous.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 692, 693

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 14, p. 138 ; Zaidunil-Ambani, Vol. 2, p. 70.

Where there are no male paternal or *Asab* relations.

Art. 386. Failing a male paternal or *Asab*¹ relation, or if he be of unsound mind, profligate or untrustworthy, the child is to be entrusted to a uterine relation² within the prohibited degrees of relationship in the following order :—to the maternal grandfather, then to the uterine brother, to his son, to his uterine paternal uncle, to his full maternal uncle, to his consanguine maternal uncle, or to his uterine maternal uncle. The daughters of uncles or aunts are only entrusted with the custody of girls ; and the sons of uncles and aunts are only entrusted with the custody of boys.

Where a girl has no other relation than a male cousin, the judge may place her in his custody, provided he be trustworthy ; otherwise the judge will entrust the child to some woman deemed to be a fit and proper person.

¹ Agnate.

² *Zouvil Arham*.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 693.

Zaidu-nil-Ambani, Vol. 2, p. 71.

The brother of the mother of an infant girl, whose parents are dead, is entitled, according to Mahomedan law, to the custody of her property in preference to a woman, who is not connected with the minor by any relationship—In the matter of *Imam Bukhsh*, I. L. R., 9 Cal., 599 (1883).

A Mahomedan grandmother is entitled to the custody of a girl, where her mother has forfeited guardianship by reason of her marrying a stranger—*Fuseehun v. Kajo*, I. L. R., 10 Cal., 15 (1883).

Where a girl has not attained the age of puberty, the maternal grandmother is her proper guardian, in preference to her paternal uncle—*Bhoocha v. Elahi Bur*, I. L. R., 11 Cal., 574 (1885).

Art. 387. When a woman whose duty it is to take custody of the child, refuses to fulfil this duty, she can be compelled to do so, if she is unmarried and there is no other relation competent to do so, or if the relation next in order refuses the responsibility.

Where a woman refuses to take custody of the child.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 689, 690.

Zaidu-nil-Ambani, Vol. 2, p. 72 ; Clavel, Vol. 1, p. 322.

Art. 388. The expenses of the child's custody are separate from those of maintenance and suckling. The father, however, is equally responsible for them if the child has no means of its own, but if it has means of its own, the father is neither bound to pay

Costs in regard to a child's custody.

for its custody, nor for its suckling, food, clothing or lodging.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 691.

Zaidu-nil-Ambani, Vol. 2, p. 73.

Where mother is not entitled to remuneration for the custody of her child.

Art. 389. Where a mother is entrusted with the custody of her child, either during the marriage, or during the period of *Iddat*¹ consequent upon a revocable repudiation,² she is not entitled to any remuneration. But if she is entrusted with the custody of the child after the marriage is irrevocably dissolved, or when she is married to a relation of the child within the prohibited degrees,³ she is entitled to remuneration.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 690, 691.

Zaidu-nil-Ambani, Vol. 2, p. 74.

Where both the father and child are without means.

Art. 390. Where both the father and the child are without means, and there are no relations within the prohibited degrees, who will gratuitously undertake the child's custody, the mother, in spite of her refusal to take charge of the child without remuneration, can be compelled to do so and to attend to its education.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 688, 692.

Zaidu-nil-Ambani, Vol. 2, p. 76

Age at which custody of a boy or girl ceases.

Art. 391. For a boy the right of custody ceases at the age of seven years, and for a girl at the age of nine years.

¹ See Art. 310.

² See Art. 227.

³ See Art. 22.

At these ages the father can claim and withdraw the child, and in case of refusal, the person who has custody of the child can be compelled to give up the child. On her part, if she wishes to give up the child, she can compel the father to withdraw him.

When the child is a boy and has neither father nor grandfather, he must be placed in the charge of a near paternal male relation, but if a girl she can only be placed in charge of a male relation, who is within the prohibited degrees of marriage.

Where the child has no paternal male relation, it must be left in the charge of the person in whose custody it is, unless the judge can find a more capable or trustworthy person as a guardian.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 694, 695.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 14, p. 139 ; Zaidunil-Ambani, Vol. 2, p. 77.

The mother is, according to Mahomedan law, the proper person to have charge of an infant son under the age of seven years—*Futteh Ali Shah v. Fuzeelutunnissa*, W. R. Snp. Vol., 131 (1864).

It is perfectly clear, according to Mahomedan law that the mother is entitled to the custody of a child, if a boy, he is to remain in that custody till seven years, and if a girl till puberty—In the matter of *Tayheb Ally*, 2 Hyde, 63 (1864).

According to the Shia School of Mahomedan law, the custody of a female child rests with the mother only up to the seventh year—*Raj Begum v. Reza Hossein*, 2 W. R., 76 (1865).

According to Mahomedan law a paternal uncle has no legal right to the guardianship of the property of the minors in preference to the mother, while it is admitted that the mother has the preferential right to the custody of their persons—*Alimodeen Moallem v. Syfoora Bibee*, 6 W. R., 125 (1866).

A Mahomedan mother has the right to the custody of the person of her minor son up to the age of seven years—In the matter of *Ameeroonissa*, 11 W. R., 297 (1869).

The right to the care and custody of a Mahomedan girl belongs not to the husband, but to her mother until she attains the age of puberty—In the matter of *Khatija Bibi*, 5 B. L. R., 557, *per* Norman, J. (1870).

Although the mother's custody of an infant wife who has not attained puberty may be legal, custody by the husband is not necessarily illegal under Mahomedan law—In the matter of *Mahin Bibi*, 13 B. L. R., 160 (1874).

Where a Mahomedan woman sued for the custody of her minor sister as her legal guardian, held, that although she would be *primâ facie* entitled to the guardianship of her younger sister, yet her own bad character and manner of life must be held to disqualify her according to Mahomedan law—*Abasi v. Dunne*, I. L. R., 1 All., 598 (1878).

According to the Shia School of Mahomedan law, a mother is entitled to the custody of her daughter, unless she has committed some act of impropriety—In the matter of *Hosseini Begum*, I. L. R., 7 Cal., 434 (1881).

According to Mahomedan law the effect of the contract of marriage is to place the wife under the dominion of the husband, but notwithstanding the marriage the right to the care and custody of a girl belongs not to the husband but to her mother, until she attains the age of puberty—*Nur Kadir v. Zulaikha Bibee*, I. L. R., 11 Cal., 649 (1885).

Under Mahomedan law, a mother's title to the custody of her children remains until they attain the age of seven years—*Idu v. Amiran*, I. L. R., 8 All., 322 (1886).

A Mahomedan father governed by the Shia School of Mahomedan law, is entitled to the custody of his children after they have attained the age of seven years. The mother would be entitled to the custody of a girl only until she was seven years—*Lardli Begum v. Mahomed Amir Khan*, I. L. R., 14 Cal., 615 (1887).

A Mahomedan mother is entitled to the custody of her daughter in preference to the father until the girl attains the

age of puberty—*Kurban* *iv. King-Emperor*, I. L. R., 32 Cal., 444, *per* Harington, J. (1904).

See *Muchoo v. Arzoon Sahoo*, 5 W. R., 235 (1866); In the matter of *Saithri*, I. L. R., 16 Bom. 307 (1891); In the matter of *Joshy Assam*, I. L. R., 23 Cal., 290, *per* Sale, J. (1895); *Mokoond Lal Singha v. Nobodip Chunder Singha*, I. L. R., 25 Cal., 881 (1898).

Art. 392. While the custody lasts, neither the child's father nor any other guardian, can take the child away from the place in which the custodian resides without her consent. Custodian's right in respect of the child.

But if the custodian marries a stranger and if there be no other female relation of the mother competent to be entrusted with the custody, the father can withdraw the child. On the other hand if the custodian's right, or the right of any of her relations revives, the father must immediately return the child to the former custodian or competent relation.

Notes.

Radd-ul-Muhtâr Vol. : 2, p. 697, 698.

Zaidunil Ambani, Vol. 2, p. 78.

Art. 393. During the period of *Iddat*¹ consequent upon repudiation, a mother can in no instance remove the child entrusted to her care from the place in which the father lives. Wife's right to remove child during and after *Iddat* consequent upon repudiation.

After the expiry of her *Iddat*, she cannot remove the child to any great distance from the place in which the father lives, without the latter's consent; such as from one town to another town, or from a village to a town, or from one village to another, unless she was

¹ See Art. 310.

born in the place to which she wishes to transfer the child.

But if she was not born in the place to which she wishes to remove the child, or if she was born but not married there, she cannot remove the child without the father's consent, unless the place be at such a distance as to enable the father to visit the child and return the same day before nightfall.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 697.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 14, pp. 139, 140 ;
Zaidu-nil-Ambani, Vol. 2, p. 79 ; Clavel, Vol. 1, p. 324.

No custodian
except
mother can
remove child
without
father's con-
sent.

Art. 394. No person having the custody of a child other than the mother, can in any case remove it from the place in which the father lives without his consent.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 697.

Zaidu-nil-Ambani, Vol. 2, p. 79.

**SECTION IV.—THE DUTIES OF A FATHER WITH REGARD
TO THE MAINTENANCE OF HIS CHILDREN.**

(Arts. 394—407.)

Duties of a
father to-
wards his
children.

Art. 395. Every father is bound to provide food, raiment, and lodging for his child if without means, whether it be a boy or a girl. In the case of a boy the obligation lasts until he is able to provide for his own needs by his labour, in the case of a girl until she is married.

Notes.

Bahrr-ul-Rayek, Vol. 4, p. 218 ; **Fatawa-i-Alamgiri**, Vol. 2, p. 178 ; **Radd-ul-Muhtâr**, Vol. 2, pp. 727, 728, 729.

Hamilton's **Hedayah**, Vol. 1, Bk. 4, Chap. 15, s. 4, p. 146 ; **Zaidu-nil-Ambani**, Vol. 2, p. 79 ; **Clavel**, Vol. 1, p. 297.

Art. 396. A father is obliged to maintain his adult son if he be without resources, crippled, or suffering from an infirmity that renders him unable to work for his own livelihood. He is also responsible for the maintenance of his adult unmarried daughter, if she is without resources, even though she has no infirmity.

Where father must provide maintenance for his adult son

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 729.

Baillie, Bk. 6, Chap. 2, p. 458 ; **Zaidu-nil-Ambani**, Vol. 2, p. 81.

Art. 397. A father is alone responsible for the maintenance of his children, who are without means of their own, unless he himself is poor and also infirm or suffering from a malady which prevents him from carrying out his obligation. The maintenance of the children then devolves upon those relations, whose duty it is to maintain the children in the case of the father's death.

Where father is responsible for his children's maintenance.

Notes.

Rudd-ul-Muhtâr, Vol. 2, p. 730.

Zaidu-nil-Ambani, Vol. 2, p. 84.

Where father
is poor but
in good
health.

Art. 398. A father who is poor, but who does not suffer from any infirmity or malady, cannot be released by reason of his poverty from the duty of maintaining his children. It is his duty to provide for them by his labour. If he refuses to work for them, although capable of doing so, he can be compelled under penalty of imprisonment. Should the proceeds of the father's labour be not sufficient to satisfy the needs of his children, or should he fail to find work, the nearest relations in easy circumstances shall be called upon to make up the deficiency.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 728, 730.

Baillie, Bk. 6, Chap. 12, p. 456 ; Zaidunil-Ambani, Vol. 2, p. 84.

Where the
mother
becomes
responsible
for the
maintenance
of her
children.

Art. 399. Where a father is destitute, the mother, if she has the means, becomes responsible for the maintenance of her children. Whether it be the mother or any other relation who advances the money for maintenance, the sums advanced remain a debt against the father, to be recovered when he is in easier circumstances.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 728, 730.

Baillie, Bk. 6, Chap. 2, pp. 457, 458 ; Zaidunil-Ambani, Vol. 2, p. 84 ; Clavel, Vol. 1, p. 299.

Where near
relations
become
responsible
for child-
ren's main-
tenance.

Art. 400. Where a father is dead or held to be so, and leaves a minor child without means, or an adult child who is infirm, and in either case having ascendants in easy circumstances, if the latter be all related in

the same degree to the deceased but cannot all inherit from him, the ascendant who would inherit is responsible for the maintenance. Thus, if a child has a paternal grandfather and a maternal grandfather, both in easy circumstances, it is the duty of the former to provide for his grandchild's maintenance.

Where the ascendants can all inherit from the deceased, they are all bound, proportionately to their respective rights in the estate to share in providing for the child's maintenance. Thus, if the child has a mother and a paternal grandfather, the latter is liable for two-thirds and the mother for one-third of the maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 737.

Zaidn-nil-Ambani, Vol. 2, p. 87.

Art. 401. Where a father is dead or held to be so, and leaves a minor child without means, or an adult child who is infirm, and there are in either case ascendants and collateral relations, who cannot all inherit from the deceased, the nearest ascendant is alone liable for the maintenance, whether he or a collateral relation is the sole heir. Thus, if a child without means, has a paternal grandfather and a full brother or a maternal grandfather and an uncle, in either case it is the grandfather who will bear the expenses of maintenance.

Where the ascendants become responsible before collateral relations.

If the ascendants and collateral relations can all inherit from the deceased, they must bear the cost of the child's maintenance between them in proportion to their respective shares in the inheritance. Thus, if a child has a mother and a full brother, or a full nephew

or a full uncle, the mother will pay one-third and the male paternal relation two-thirds of the maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 737.

Zaidu-nil-Ambani, Vol. 2, p. 89 ; Clavel, Vol. 1, p. 300.

Where the
father is
missing

Art. 402. Where a father is missing and leaves behind him children to whom maintenance¹ is due and also leaves property in his house of such nature as may be used for maintenance, the judge can order maintenance out of such property. If the absent father leaves property in deposit, or has a debt due to him, the judge can order payment of the maintenance out of the deposit or debt, provided that either can be made use of for such a purpose, and the depositary or creditor respectively admits the deposit or the debt.

A child without means can also take what is necessary for its subsistence out of property left by its absent father, provided that such property can be made use of for maintenance.

Notes.

Fatawa-i-Alamgiri, Vol. 2, pp. 178, 179 ; Radd-ul-Muhtâr, Vol. 2, p. 731.

Zaidu-nil-Ambani, Vol. 2, p. 91.

A father is
not respon-
sible for
maintenance
of his minor
son's wife.

Art. 403. A father is not responsible for the maintenance of the wife of his minor son, who is without means, unless he has undertaken to be so. He can nevertheless be ordered to provide for her maintenance,

which he can recover from the son, when his position in life improves.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 699.

Baillie, Bk. 6, Chap. 3, p. 463 ; Zaidunil-Ambani, Vol. 2, p. 95.

A Court is not competent to award to a Mahomedan daughter-in-law a monthly allowance for maintenance against her father-in-law—*Meer Ubdool Kureem v. Fakhroonisa*, 3 S. D. A., 60 (1820).

Art 404. When a minor son becomes old enough to earn money by his labour, his father can set him to work or can have him taught a trade which will enable him to earn his own living. A father can employ his son's earnings in providing for the latter's maintenance, and if there is any surplus, can lay it by, and hand it over to the boy on his attaining majority.

Where father can set his minor son to employment.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 728, 729 ; Fatawa-i-Alamgiri, Vol. 2, p. 178.

Baillie, Bk. 6, Chap. 3, p. 458 ; Zaidunil-Ambani, Vol. 2, p. 81.

Art. 405. Where a mother complains of the inadequacy of the sum allowed by the father for her child's maintenance or of the father's refusal to pay for maintenance, the judge shall fix the amount and order it to be paid to the mother for the benefit of the child.

Where the sum paid for child's maintenance is inadequate the judge shall fix the amount.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 728, 729 ; Fatawa-i-Alamgiri, Vol. 2, p. 177.

Zaidunil-Ambani, Vol. 2, p. 95.

Mother may come to an agreement as regards maintenance.

Art. 406. A mother can validly come to an agreement with the father as to the sum due for the maintenance of their children. Should the sum agreed upon exceed that which the children require, the surplus need not be returned to the father, but if the sum agreed upon be insufficient, the father must raise it to the necessary amount.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 178.

Baillie, Bk. 6, Chap. 2, p. 459 ; Zaidunil-Ambani, Vol. 2, p. 96.

Debt for maintenance judicially decreed.

Art. 407. A debt for maintenance decreed by a judge in favour of a child without means, is not extinguished if left unclaimed for one month or more, even when the child's mother has borrowed money for its maintenance without first obtaining an order from the judge.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 743, 745 ; Fatawa-i-Alamgiri, Vol. 2, p. 177.

Zaidunil-Ambani, Vol. 2, p. 97 ; Clavel, Vol. 1, p. 301.

CHAPTER. III.

MAINTENANCE OF PARENTS BY THEIR CHILDREN.

(Arts. 408—414.)

Children responsible for maintenance of their ascendants without means.

Art. 408. Children of either sex, minor or adult if in easy circumstances are responsible for the maintenance of poor parents and grandparents, whether they are infirm or able to earn their own living.

Notes.

Fatawa-i-Alamgiri, Vol. 2, pp. 178, 179 ; Radd-ul-Muhtâr, Vol. 2, p. 736.

Baillie, Bk. 6, Chap. 3, p. 461 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 5, p. 147 ; Zaidunil-Ambani, Vol. 2, p. 99.

See Sale's Koran, Chap. XXXI, p. 336.

A Mahomedan is not bound to maintain his widowed step-mother—*Budday Saib v. Zoonoo Bee*, Dec. Mad. S. A., 199 (1853).

Art. 409. Where a father is infirm or ill and unable to take care of himself, his child must pay for the maintenance of a servant, in order that his wants may be attended to.

Where father is unable to look after himself, child must furnish a servant's maintenance

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 736 ; Fatawa-i-Alamgiri, Vol. 2, p. 179.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 5, p. 147 ; Zaidunil-Ambani, Vol. 2, p. 101.

Art. 410. No child is obliged to maintain its mother if she has married a second time, as this obligation rests entirely upon her husband ; but if the second husband be in embarrassed circumstances, or be absent and have left no property the child, if in a position to do so, must maintain its mother and recover the amount from the husband when he returns or becomes solvent.

Where mother marries a second time her maintenance is not incumbent on child

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 735.

Zaidunil-Ambani, Vol. 2, p. 101.

Art. 411. The maintenance of a poor father is not incumbent on a child who is also poor, unless the latter is able to work for its living while the father is

Maintenance of poor parents incumbent

upon the
child.

infirm and unable to do so. The poor mother is held in the same light as the infirm father, even though she suffers from no infirmity.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 735.

Baillie, Bk. 6, Chap. 3, p. 462 ; Zaidunil-Ambani, Vol. 2, p. 102.

Maintenance of
poor parents
when child
is missing
but has left
property
behind.

Art. 412. Where an absent child leaves behind him any property or a debt which is due to him, the judge can order that the destitute parents of the absent child shall be maintained out of such property or debt, provided it can be made use of for such a purpose.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 722, 742, 743.

Zaidunil-Ambani, Vol. 2, p. 103.

Where main-
tenance falls
upon the
Public Treas-
ury.

Art. 413. The maintenance of the aged, the crippled and the sick who are without means and without relations falls upon the *bait-ul-mal*.¹

Notes.

Radd-ul-Muhtâr, Vol. 3, p. 306.

Zaidunil-Ambani, Vol. 2, p. 105.

Proportion
of mainte-
nance due in
respect of
poor rela-
tions.

Art. 414. The obligation of children to maintain their poor parents, is irrespective of their shares in the inheritance of their parents and is based on their condition in life. Thus a son and a daughter, both in a condition to provide maintenance, must each contribute one-half.

¹ Or the public treasury.

In the same manner two sons in easy circumstances, one of whom is a Muslim and the other a Christian or a Jew, must each provide one-half of the maintenance.

Grandchildren of either sex related in the same degree must contribute equally to the maintenance of their ascendants.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 735, 736 ; Fatawa-i-Alamgiri, Vol. 2, p. 179.

Baillie, Bk. 6, Chap. 3, pp. 463, 464 ; Zaidunil-Ambani, Vol. 2, p. 106.

CHAPTER IV.

MAINTENANCE OF RELATIONS OTHER THAN ASCENDANTS
AND DESCENDANTS.

(Art. 415—419.)

Art. 415. The liability to maintain a poor relation in need of assistance is distributed among his relations within the prohibited degrees, in proportion to the shares they would take in his inheritance.

Liability of maintenance is distributed among relations within prohibited degrees.

The law makes no difference between claims for maintenance made by minors of either sex, or male adults who are infirm and unable to earn their livelihood, and between claims made by adult females enjoying good health and able to work.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 739, 740.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 5, pp. 147, 148 ; Zaidunil-Ambani, Vol. 2, p. 108.

See Sale's Koran, Chap. II, p. 48.

Difference of religion does away with obligation of maintenance.

Art. 416. Difference of religion does away with the obligation of maintenance, unless the claimant is the wife, an ascendant or a descendant of the party liable for the maintenance and is a non-Muslim. Thus a Muslim is in no way liable for the maintenance of his non-Muslim brother and *vice versâ*.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 181.

Baillie, Bk. 6, Chap. 3, p. 466 ; Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 5, p. 147 ; Zaidunil-Ambani, Vol. 2, p. 111.

Obligation of maintenance rests first with the relation with whom marriage is prohibited.

Art. 417. The uterine relation outside the prohibited degrees¹ is free from any obligation to provide maintenance so long as there exists a relation with whom marriage is prohibited. Where there are two relations, one of whom is within the prohibited degree and the other not, payment of the maintenance is incumbent upon the former and not upon the latter.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 180.

Zaidunil-Ambani, Vol. 2, p. 112.

Where there are several relations they contribute proportionately to their shares in the inheritance.

Art. 418. Where there are several relations, all of the same degree and all in easy circumstances, maintenance is incumbent upon those who are entitled to inherit, in proportion to their shares in the inheritance.

Thus if there is a paternal and also a maternal uncle both in easy circumstances, the former must bear the whole cost of his nephew's maintenance as he would inherit from the nephew to the exclusion of the maternal uncle. A paternal uncle must also bear the

¹ See Art. 22.

cost of maintenance to the exclusion of a paternal aunt. Where there is a maternal uncle and also a maternal aunt, the uncle provides two-thirds and the aunt one-third of the maintenance.

Should the person in need of maintenance have three sisters, the full sister must contribute three-fifths of the maintenance, the consanguine sister one-fifth, and the uterine sister one-fifth. Should there be three brothers, the uterine brother is responsible for one-sixth, and the full brother for the remainder of the maintenance, the consanguine brother being totally exempted.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 740, 741 ; Fatawa-i-Alamgiri, Vol. 2, p. 180.

Zaidu-nil-Ambani, Vol. 2, p. 113.

Art. 419. A debt for maintenance due to relations other than ascendants or descendants is extinguished if not paid within one month of its becoming due, unless the debt has been contracted under an order of the judge, in which case it can be recovered from the deceased debtor's estate if not discharged in his lifetime.

Where debt for maintenance in respect of distant relations is extinguished.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 743, 744, 745.

Hamilton's Hedayah, Vol. 1, Bk. 4, Chap. 15, s. 5, p. 149 ; Zaidu-nil-Ambani, Vol. 2, p. 115.

CHAPTER V.

PATERNAL AUTHORITY (VILAYAT).

(Arts. 420—434.)

Art. 420. A father is guardian of the person and property of his children of either sex, be they minors,

Father's authority

over his
children.

or of age and legally incompetent,¹ including minors entrusted to the custody of their mother or her relations. He has also the power to give such children in marriage.

Notes.

Zaidu-nil-Ambani, Vol. 2, p. 116.

The position of a Mahomedan widow in respect of her deceased husband's estate, is ordinarily nothing more or less than that of any other heir, and even in case of minority of her children, she cannot exercise any power of disposition with reference to their property, because she cannot act as their guardian in respect of such matters. Under certain limitations she may act as guardian of the person of her children till they reach the age of discretion, but the interest of their property never vests in her without special appointment by the ruling authority, in default of other relations who are entitled to such guardianship—*Sitaram v. Amir Begum*, I. L. R., 8 All., 324 (1886).

As to the duties, rights, and liabilities of Guardians, see Chap. III of the Guardian and Wards Act (VIII of 1890).

Such authority exists even when child attains puberty and insane

Art. 421. The guardianship of the father continues to exist to its full extent, over the person and property of a lunatic child, even after its attaining the age of puberty.² It ceases, however, when the child reaches the age of puberty and is in full possession of its mental and intellectual faculties, but revives as soon as the child subsequently becomes insane.

Notes.

Fatawa-i-Alamgiri, Vol. 2, p. 12.

Zaidu-nil-Ambani, Vol. 2, p. 118.

How a father can deal with the property of his children.

Art. 422. A father of known integrity and business capacity, can deal with the property of his minor or incapable children, by selling or otherwise disposing

¹ See Art. 553.

² See Art. 566.

of it, or by making a suitable use of it in trade or commerce, or by laying it out in merchandise with a view to its increase, and can also entrust his powers to an agent.

The father as guardian has also the power to let out or hire the services of his male child, and to lease or lend all real and personal property including lands, animals and every thing else belonging to the children subject to his authority.

Notes.

Zaidu-nil-Ambani, Vol. 2, p. 118.

A sale by a Mussalman of his children's lands, he having declined their guardianship, was held to be null and void—*Syed Ashruffali v. Mirza Quasim*, 3 Sel. Rep. S. D. A. 65 (1820).

A deed executed by the mother on behalf of minors, while the father was alive is not binding on the minors—1 Dec. N.-W., 112 (1846).

According to Mahomedan law, a sale by a guardian of the landed property of an infant, is not permitted otherwise than in case of urgent necessity, or very clear advantage to the infant—*Bakshan v. Madai Kooeri*, 3 B. L. R., 423, per Norman, J. (1869).

The question of legal necessity does not necessarily arise in cases of sale under Mahomedan law, though it properly forms an element for consideration when the conduct of a guardian is called in question. That law looks to the benefit of the minors, and permits the guardian to dispose of the property, if it be for the benefit of the minor—*Syedan v. Syed Vilayet Ali Khan*, 17 W. R., 239 (1872).

Where two Mahomedan widows sold a portion of the real estate belonging to the minor daughter of their deceased husband, to satisfy certain decrees, held, that if the minor was in possession, and was not a party to, or properly represented in the suits in which the creditors obtained decrees, then she cannot be bound by the decrees, nor by the sale subsequently effected, and according to Mahomedan law, she is entitled to recover her share on the payment by her of her share of the debts, for the satisfaction of

which the sale was effected—*Hamir Singh v. Zakia*, I. L. R., 1 All., 57, F.B. (1875).

Where a Mahomedan lady was in possession of certain property on her own account and on behalf of certain minors, who were her orphan nephew and niece, and she sold the same to satisfy certain debts and for other necessary family purposes and wants for the benefit of the minors, held, that according to Mahomedan law and the principles of equity, justice and good conscience, the sales were binding upon the minors—*Hasanali v. Mehdi Husain*, I. L. R., 1 All., 533 (1877).

No greater powers can be exercised by a *de facto* guardian who has not legally completed his right to manage a minor's estate than can be exercised by a guardian duly appointed under Act XL of 1858—*Abhassi Begum v. Rajroop Koonwar*, I. L. R., 4 Cal., 33 (1878).

Although, according to Mahomedan law, an uncle cannot be the guardian of the property of a minor, yet there is nothing to prevent him from representing his minor nephew, as next friend in a suit, under the Code of Civil Procedure—*Abdul Bari v. Rash Behari Pal*, 6 C. L. R., 413 (1880).

A Mahomedan guardian is at liberty to sell the property of his ward, where he has no other property and the sale of it is absolutely necessary for his maintenance—*Husein Begam v. Zia-ul-nisa*, I. L. R., 6 Bom., 467 (1882).

Where the mortgagors of certain shares of a Mahomedan infant were not the guardians of the property, such shares would not be bound by the mortgage executed by persons who had no power to bind the infant—*Bhutnath Dey v. Ahmed Hosain*, I. L. R., 11 Cal., 417 (1885).

According to Mahomedan law, a guardian is not at liberty to sell a minor's immovable property, the title to which property is not disputed except under certain circumstances; but where a father executed a deed of sale of immovable property of his minor son for his benefit and in his interest held, that the father was entitled to execute such a deed—*Kali Dutt Jha v. S. Abdool Ali*, I. L. R., 16 Cal., 627; I. L. R., 16 I. A., 96 (1888).

To authorize a sale by the guardian of a Mahomedan minor, there must be an absolute necessity for the sale or else it must

be for the benefit of the minor. Mahomedan law makes no provision for mortgages, as such transactions were, strictly speaking, unlawful, as they involved the payment of interest on money borrowed. As, however, mortgages do exist among Mahomedans, and between Mahomedans and other sects, they must be governed by the same principles as apply to sales—*Hurbai v. Hiraji*, I. L. R., 20 Bom., 116 (1895).

The mother not being the legal guardian of her minor child, according to Mahomedan law, cannot do any act relating to the property of the minor so as to bind him—*Baba v. Shirappa*, I. L. R. 20 Bom 199 (1895).

A minor is not liable for acts of a person who has no authority to act as his guardian and mortgage his property—*Nizamuddin v. Anandi Prasad*, I. L. R., 18 All., 373 (1896).

The mother is not the natural guardian of her children according to Mahomedan law. She is entitled to the custody of the person of her minor children, but she has no right to the guardianship of their property, or to bind their estate unless specially authorized by the Judge to do so—*Moyna Bibi v. Banku Behary Biswas*, I. L. R., 29 Cal., 473 ; 6 C. W. N., 667 (1902).

A Mahomedan mother is not the legal guardian of the property of her minor children, and she cannot do any act relating to their property so as to bind them, and a sale or mortgage made by her cannot as such bind the minor children.—*Pathummbi v. Vittil Ummachari*, I. L. R., 26 Mad., 734 (1902).

A sale of property made by a *de facto* Mahomedan guardian of a minor girl, for the benefit of such minor is binding upon her—*Majidan v. Ram Narain*, I. L. R., 26 All., 22 (1903).

Any one having the care of the person or property of a minor, may enter into a contract on his behalf, where the profit is clear and certain or where it would be manifestly for the benefit of the minor. A *de facto* guardian, such as the mother, who is not the natural guardian of a minor can, under Mahomedan law, alienate his property for legal necessity and for his benefit—*Mafuzzul Hosain v. Basid Sheikh*, 4 Cal. L. J., 485, *per* Rampini, J. (1906).

See *Sitaram v. Amir Begum*, I. L. R., 8 All., 324 (1886) ; *Abdul Sarang v. Puttee Bili*, I. L. R., 29 Cal., 738 (1902).

Where a child on attaining puberty can rescind contracts made on its behalf by the father.

Art. 423. Where a father consents to the sale, loan or lease of his child's movable or immovable property, or to any purchase made for the child's benefit, and the child thereby incurs a slight loss, the transaction is valid and cannot be rescinded by the child upon attaining its majority. Where, however, great loss is incurred through a sale, loan or lease, the transaction is null and void, and consequently cannot be ratified by the child upon attaining majority.

The child, on attaining its majority, can cancel the unexpired agreement made by its father for the hire of its services if the child prefers not to abide by it. If, however, the unexpired agreement be for the loan or lease of its property the child, on attaining its majority, cannot cancel such agreement.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 493, 494, 495.

Zaidu-nil-Ambani, Vol. 2, p. 119.

Where father being bad administrator sells his child's property.

Art. 424. Where a father who is known to be a bad administrator, sells as guardian immovable property belonging to his minor or incapable child, the child upon attaining its majority can cancel such sale, unless the price amounts to double the value of the property sold.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 495.

Zaidu-nil-Ambani, Vol. 2, p. 121.

Where father misapplies the property of his minor child.

Art. 425. Where a father misapplies the property of his minor children, and is deemed incapable of properly preserving such property, the judge can appoint another guardian who will be entrusted with the management of the entire property of the children.

Notes.

Bahrr-ul-Rayek, Vol. 8, p. 527 ; Fatawa-i-Kazi Khan, Vol. 4, p. 443.

Zaidu-nil-Ambani, Vol. 2, p. 122 ; Clavel, Vol. 1, p. 346.

Art. 426. A father, on his own account, can validly buy property from, or sell his own property to, his minor or incapable children.

Father can buy his minor children's property and sell his property to them.

Where he buys their property, he is only released from the payment in respect of such purchase by delivery of the price to a guardian, appointed by the judge, who will hand it back to the father in the name of the child.

Where the father sells property of his own to his child, the mere fact of the sale does not in itself constitute a legal presumption of his having taken possession on the child's behalf, and should the property suffer any loss before actual delivery, the father is alone responsible.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 493, 494.

Zaidu-nil-Ambani, Vol. 2, p. 123.

Art. 427. A father as guardian, can pledge his own goods in the interests of his child and can take the goods of his child as a security. He can pledge his child's goods as a security for a debt owed him by such child, or for a debt of his own.

Father as guardian can deal with his child's goods by way of loan and security.

Where the goods of the child, given as a security for the father's debt, perish, the latter is responsible for the loss up to the amount of his debt and not for the surplus when the value of the goods pledged exceeds that of the debt.

Notes.

Fatawa-i-Kazi Khan, Vol. 4, p. 437 ; Radd-ul-Muhtâr, Vol. 5, p. 348.

Zaidu-nil-Ambani, Vol. 2, p. 124.

Father himself cannot lend, borrow or make a gift of minor child's property.

Art. 428. A father can neither lend the property of his minor child, unless it be to a trustworthy person, nor can he borrow such property himself, nor make a gift of it by way of exchange

Notes.

Fatawa-i-Alamgiri, Vol. 7, p. 104 ; Bahrr-ul-Rayek, Vol. 8, p. 528.

Zaidu-nil-Ambani, Vol. 2, p. 126.

Where father cannot agree to the assignment of a debt of his minor child.

Art. 429. A father as guardian, cannot agree to the assignment of a debt belonging to his son, though not contracted by the latter, unless the solvency of the assignee is superior to that of the son.

Notes.

Zaidu-nil-Ambani, Vol. 2, p. 127.

See Chapter VIII of the Transfer of Property Act (IV of 1882).

Father's claim to sums paid for articles during minority.

Art. 430. A father has no claim against his minor child, who is without means, for the value of such articles as a father is bound to provide for his child. On the other hand the father can claim the value of articles which he has provided, though not bound to do so, provided that when furnishing such articles he stated before witnesses that it was his intention to recover them from the child.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 505.

Zaidu-nil-Ambani, Vol. 2, p. 129.

Art. 431. Where a father, before his death, specifies which is his son's property, the latter upon reaching his majority can himself, or if a minor by his guardian, claim such property if it exists, or if not its value.

Son may at once claim property specified as his before father's death

Notes.

Zaidu-nil-Ambani, Vol. 2, p. 130.

Art. 432. Where a child on reaching majority sues the father for recovery of property which the latter states has perished or was spent in maintaining the child during its minority, the father's sworn declaration shall be accepted, provided that the amount spent on maintenance was reasonable.

Where a child sues father for property consumed during minority.

Notes.

Zaidu-nil-Ambani, Vol. 2, p. 131.

Art. 433 In order to maintain himself and the mother, wife, and children of an absent child, the father, who is in straitened circumstances, can sell the movable property of such absent child if the latter has attained his majority. If the absent child is a minor or insane, the father can sell its movable and immovable property. This power does not extend to the child's mother or any other relation or even to the judge.

Where a poor father can sell the property of absent child to provide maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 742.

Zaidu-nil-Ambani, Vol. 2, p. 132 ; Clavel, Vol. 1, p. 311.

Art. 434. On the father's death the guardianship of the person of his minor or incapable children devolves upon the paternal grandfather, and then on the child's male paternal relations as mentioned in Article 35.

Guardianship after father's death.

The guardianship of the property of his children devolves :—(1) upon the executor, if any, appointed by the father, even if such executor be an entire stranger to the family ; (2) upon the executor, if any, of such executor ; (3) the paternal grandfather ; (4) his executor, if any. Failing these, the guardianship devolves upon the judge or on any person appointed by him.

Notes.

Zaidu-nil-Ambani, Vol. 2, p. 133.

Under Mahomedan law, in default of paternal relations, who, by blood, have authority to act as guardians to minors, the ruling power is the guardian—*Ushruj-oon-nissa v. Nujeeba Banoo*, 7 Sel. Rep., S. D. A., 65 (1848).

BOOK V.

GIFTS (*HIBA*) : WILLS (*WASAYA*) : EXECUTORS (*WASI*) :
INHIBITION (*HAJR*) : MISSING PERSON (*MAFKOOD*).

(Arts. 435-581.)

CHAPTER I.

GIFTS INTER VIVOS.

(Arts. 435-464.)

SECTION I.—REQUISITE CONDITIONS FOR THE VALIDITY OF A GIFT.

(Arts. 435-439)

Art. 435. A gift is complete by the declaration of gift made by the donor and its acceptance on the part of the donee. The taking possession of the property by the donee is equivalent to its acceptance. What completes a gift

Notes.

Kauz-uz-Dakaiq, p. 302 ; Fatawa-i-Alamgiri, Vol. 5, pp. 228, 230.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 1, p. 482 ; Zaidunil-Ambani, Vol. 2, p. 229.

Gift (*hiba*), in its literal sense, signifies the donation of a thing from which the donee may derive a benefit ; in the language of the law, it means a transfer of property, made immediately ; and without any exchange.—Hamilton's Hedayah, Vol. 3, Bk. 30, p. 482.

Section 122 of the Transfer of Property Act (IV of 1882) defines gift as follows :—Gift is the transfer of certain existing movable and immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

See Chapter VII of the Transfer of Property Act (IV of 1882).

A deed of gift by a Mahomedan lady in favour of a minor who had been adopted as a son into her family was sufficient to give legal validity to the gift notwithstanding that the father of the child was alive at the time—*Banoo Beebee v. Chand Beebee*, 2 Sel. Rep. S. D. A., 230 (1816).

Where a certain deed was not in the form of a *hibanamah* but the donor had given the property in question to the donee, held, the gift was good and valid according to Mahomedan law—*Moohummud Umeer Khan v. Jumadar Bucha Bhaee*, 2 Borr. Bom. S. A., 200 (1822). See 2 Borr. 665, Bom. S. A. (1823).

The legal objection of indefiniteness raised against a deed of gift made according to Mahomedan law, under which the donees have been in joint possession for a period of upwards of twelve years is not maintainable—*Syud Shah Basit Ali v. Syud Shah Imamooddeen*, 3 Sel. Rep., S.D.A., 234 (1822).

A gift of property in possession of a Mahomedan husband in favour of his wife is valid—*Oojudhea Beebee v. Mohun Beebee*, 6 Sel. Rep., S. D. A., 34 (1835).

A prior deed of dower, which settled only a fixed sum upon the wife, would not, according to Mahomedan law, debar the husband from making a gift of his real property in favour of others—*Suffuronisa v. Ayesha*, 6 Sel. Rep., S. D. A., 215 (1837).

Where a Mahomedan by a deed of gift declared that he had adopted a son who was to succeed to his property and title, held, that the deed of gift was not accompanied by delivery of possession and seizin by the donee and the gift was consequently inoperative according to Mahomedan law—*Jeswunt Sing-Jee v. Jet Sing-Jee*, 3 M. I. A., 245 (1844).

Where a Mahomedan executed a *hiba* in favour of his wife containing various conditions limiting her power over the property given, held, that the conditions rendered the gift void—*Chand Khan v. Beluk Khuna Bibi*, Dec. S. D. A., 105 (1850).

A gift by a Mahomedan lady in favour of her children without the consent of any one of them is valid—*M. Zuheerul Huq v. Butoolun* 1 W. R., 79 (1864).

A gift under Mahomedan law cannot depend upon a contingency or be postponed; seizin must be immediate—*Roshun Jahan v. Enaet Hossein*, 5 W. R., 4 (1866).

Under Mahomedan law a widow may give away her property by way of gift to whomsoever she pleases, but if she delays the gift till upon her death-bed, such gift would operate to a limited extent only—*Luteefoonisa v. Syed Rajoor Rahman*, 8 W. R., 84 (1867).

Where a deed of gift intimated that the donee had been a kind and attentive son and had enabled his father to redeem certain property, held, that such reference did not constitute a *hiba-bil-ewaz*, according to Mahomedan law—*Ussud Ali Khan v. Olfut Beebee*, 3 Agra H. C. R., 237 (1868).

Where Section 24 of Act VI of 1871 provides that where in any suit or proceeding there arises any question regarding “succession, inheritance, marriage or caste, or any religious usage or institution, the Mahomedan law shall form the rule of decision,” it means that such law shall, in the cases mentioned, be strictly and exclusively applied, but in regard to all other cases, such as gifts, Mahomedans shall not be deprived of their own law, but such law shall be applied rather in the spirit than in the letter, according to “Justice, equity and good conscience”—*Shumshool-nissa v. Zohra*, 6 N. W., P. H. C. R., 2, per Stuart, C. J. (1873).

Where a Mahomedan lady made a gift of certain property of which she was not in actual possession, held, that though she could sell the property she could not make a valid gift of it according to Mahomedan law—*Mohinuddin v. Manchershah*, I. L. R., 6 Bom., 650 (1882).

According to Mahomedan law, a declaration made by a person in an instrument of gift making the grantee owner of the

grantor's share in her husband's property cannot create a proprietary right in the said share after the grantor's death—*Kuwarbai v. Mir Alam Khan*, I. L. R. 7 Bom., 170 (1883).

Where a deed of gift stated that the donor's father always protected her and that she gave him a certain property in full confidence that he would continue to do so, held, that the instrument, if not a simple gift, was at any rate "a gift on stipulation," which equally required that seizin should be given to the donee under Mahomedan law—*Mogulsha v. Mahamad*, I. L. R., 11 Bom., 517 (1887).

In a gift seizin is necessary and absolutely indispensable to the establishment of proprietary right under Mahomedan Law—*Meherali v. Tajudin*, I. L. R., 13 Bom., 156, *per* Sargent, C. J. (1888).

The rule of Mahomedan law in regard to *hiba* is that the gift must not be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it—*Bava Saib v. Mahomed*, I. L. R., 19 Mad. 343 (1896).

Where a testator before his death handed over to his widow certain deposit notes of the Bank of Bengal, held, that it was quite clear that the effect of handing the notes was not to transfer the debts or to give the widow the dominion over them or to enable her to recover the money secured by the notes, though such act was evidence of an intention to make a transfer of the same. In the circumstance the gift was incomplete and no legal effect could be given to it—*Aga Mahomed Jaffer Bindanim v. Koolsom Beebee*, I. L. R., 25 Cal., 9 P. C. (1897).

See *Musnad Ali v. Khurseed Banoo*, Sel. Rep., S. D. A., 69 (1801); *Shekh Humeed-ood-Deen v. Nuzur-ood-Deen*, 2 Borr. Bom. S. D. A., 704 (1824); *Futteh Ali v. Janwa*, 6 Sel. Rep., S. D. A., 216 (1837); *Jeetoo v. Buddun*, 6 Sel. Rep., S. D. A., 231 (1837); *Mandoo Bibee v. Jahandar Khan*, 1 Agra H. C. R., 350 (1868); *Noor Kadar Khan v. Hurdyal*, 1 Agra H. C. R., 67 (1868); *Gulam Hussain v. Aji Ajam*, 4 Mad. H. C. R., 44 (1868); *Furzand Ali v. Jafur Bibee*, I. L. R., 3 All., 266 (1880); *Gulam Jafar v. Mastudin*, I. L. R., 5 Bom., 238 (1880); *Suleman Kadr v. Darab Ali Khan*, I. L. R., 8 Cal., 1, P. C.; L. R., 8 I. A., 117 (1881).

Art. 436. For the validity of a gift the donor must be of sound mind and owner of the property which is given. Qualifications necessary in the donor.

Notes.

Durrul-Mukhtâr, Vol. 3, p. 102; Fatawa-i-Alam-giri, Vol. 6, p. 230.

Baillie, Bk. 8, Chap. 1, pp. 508, 509; Zaidunil-Ambani, Vol. 2, p. 232.

According to Mahomedan law a gift on a death-bed is viewed in the light of a legacy, and therefore no person can make a gift of any part of his property on his death-bed to one of his heirs, it not being lawful for one heir to take a legacy without the consent of the rest—*Ashadoola v. Shaeba Jhasors*, 2 Hay, 345 (1863).

A deed of gift, such as a *tumleeknamah*, executed by a Mahomedan lady, at a time when she was suffering from her last and fatal illness, cannot operate save as a will. Further if a will or death-bed gift be made in favour of one who is an heir of the deceased, the will or gift so far as it relates to that heir, will be inoperative without the consent of the other heirs—*Ashruffunnissa v. Azeemun*, 1 W. R., 17 (1864).

Where a Mahomedan executed a deed of gift when he was labouring under a sickness from which he never recovered, and which proved fatal to him, such gift took effect only to the extent of a third of his property—*Kureemun v. Mullick Enaet Hossein*, W. R., Sup. Vol. 221 (1864); *Molk Enaet Hossein v. Kureemounissa*, 3 W. R. 40 (1865).

The term *marz-ul-maut* is applied under Mahomedan law not only to diseases which actually cause death, but to diseases from which it is probable that death will ensue, so as to engender in the person afflicted with the disease an apprehension of death in order to guard against acts done by a person afflicted with a disease which may disturb his calm judgment, that law has provided that the person afflicted with the disease shall be deemed incompetent to make a gift of his property until after the expiration of a year from the date on which he was attacked with the disease—*Labin Beebee v. Bibbun Beebee*, 6 N. W. P., H. C. R., 159 (1874).

The provisions of Mahomedan law applicable to gifts made by persons labouring under a fatal disease do not apply to a so-called gift made in lieu of a dower-debt, which is really in the nature of a sale—*Ghulam Mustafa v. Hurmat*, I. L. R., 2 All., 854 (1880).

Where a Mahomedan suffered from a certain sickness for more than a year and while in full possession of his senses and without any immediate apprehension of death, made a gift, held, that according to Mahomedan law such gift was valid—*Muhammad Gulshere Khan v. Mariam Begam*, I. L. R., 3 All., 731 (1881).

Under Mahomedan law, the acts of disposition by a person suffering from an illness which induces the apprehension of death, and which eventually causes death, have only a qualified effect given to them—*Wazir Jan v. Altaf Ali*, I. L. R., 9 All., 357 (1887).

A death-bed gift is not valid unless the heirs give their assent and possession is taken—*Sharifa Bibi v. Gulam Mahomed*, I. L. R., 16 Mad., 43, *per* Wilkinson, J. (1892).

A careful study of the principles enunciated in the most authoritative Hanifa works would show that in determining whether the donation of a person suffering from a mortal illness comes within the doctrine applicable to *marz-ul-maut* gifts, several questions have to be considered; *viz.*—(1) Was the donor suffering at the time of the gift from a disease, which was the immediate cause of his death? (2) Was the disease of such a nature or character as to induce in the suffering person the belief that death would be caused thereby, or to engender in him the apprehension of death? (3) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create on the mind of the sufferer an apprehension of death? (4) Had the illness continued for such length of time as to remove or lessen the apprehension of immediate fatality, or to accustom the sufferer to the malady? The limit of one year mentioned in the law books does not lay down any hard-and-fast rule regarding the character of the illness; it only indicates that a continuance of the malady for that length of time may be regarded as taking it out of the category of a mortal illness—*Hassarat Bibi v. Golam Jaffar*, 3 C. W. N., 57 (1898).

According to Mahomedan law a death-illness (*marz-ul-maut*) is one which it is highly probable will end fatally whether the sick person has taken to his bed or not, or whether in the case of a man,

it disables him from rising up for necessary avocations out of the house or not, or whether in the case of a woman it does or does not disable her from necessary avocations within doors. Such illness is to be considered death-illness when a man cannot pray standing. But where the malady is of long standing, and there is no immediate apprehension of death, the illness is not a death-illness, so that a gift made by a sick person in such circumstances, if he is in the full possession of his senses, is not invalid; and where the malady had lasted a year, it should be considered of long continuance—*Fatima Bibee v. Ahmad Baksh*, I. L. R., 31 Cal., 319, *per* Rampini, J. (1903).

Art. 437. The ownership of the property is only transferred to the donee by actual and complete delivery of possession. How ownership is transferred.

If the property is already in possession of the donee and he has accepted the gift, ownership is transferred to him by the mere transaction and a fresh delivery is not necessary.

Notes.

Bahrr-ul-Rayek, Vol. 7, p. 311; Kauz-uz-Dakaiq, p. 303; Fatawa-i-Alamgiri, Vol. 5, p. 230.

Zaidu-nil-Ambani, Vol. 2, p. 233.

In a *hiba-bil-ewaz* or gift for consideration, seizin of the donee is not necessary according to Mahomedan law—*Meer Nujeeb-ullah v. Kuseema*, 1 Sel. Rep., S. D. A., 13 (1795).

According to Mahomedan law a real transfer of property by a Mahomedan in his life-time, reserving not the dominion over the corpus of the property, nor any share of dominion over the corpus, but simply stipulating for and obtaining a right to the recurring produce during his life-time, is a complete and valid gift—*Umjad Ally Khan v. Mohumdee Begum*, 11 M. I. A., 517; 10 W. R., 25, P. C. (1867).

According to Mahomedan law in order to make a gift valid, seizin is absolutely necessary—*Abedoonissa v. Ameeroonissa*, 9 W. R., 257 (1868); *Bunnoo v. Hedayut*, 6 Sel. Rep., S. D. A., 17 (1835); *Neermulee Bebee v. Assudonissa Bebee*, 6 Sel. Rep.,

S. D. A., 359 (1840); *Obedur Reza v. Mahomed Muneer*, 16 W. R., 88 (1871); *Shahjan Bibee v. Shib Chunder Shaha*, 22 W. R., 314 (1874).

According to Mahomedan law the word *tamlik* means assignment of ownership. *Tamliknamah* is said to be applicable alike to a deed of sale or gift, and gifts are said to be of two kinds, *tamlik* and *iskat*, the last properly applicable only to mere rights, and gifts by *tamlik* is restricted by the definition to *ayn* or specific things. The term *tamlik*, therefore, applies to those gifts in which an assignment of ownership over corporal property is possible, and that is only a term for a kind of gift on which the law applicable to gift is binding—*S. Kasum v. Shaista Bibi*, 7 N.-W. P., H. C. R., 313 (1875).

Where the subject-matter of the gift was not transferred to the donee during the life-time of the donor, who made the gift during his death-illness (*marz-ul-maut*), held, that the possession of the donee, who was manager of the donor, was not such possession as would render the gift valid according to Mahomedan law—*Valayet Hossein v. Maniran*, 5. C. L. R., 91 (1879).

By Mahomedan law, a gift cannot be valid unless it is accompanied by possession, and it cannot be made to take effect at any future definite period—*Yusuf Ali v. Collector of Tippera*, I. L. R., 9 Cal., 138, *per* Garth, C. J. (1882).

In dealing with questions of Mahomedan law of gift, it should not be forgotten that works of very ancient authority were promulgated many centuries ago in Bagdad, and other Mahomedan countries, under a very different state of laws and society from that which now prevailed in India; and that although the British Courts did their best here in suits between Mahomedans to follow the rules of Mahomedan law, it was often difficult to discover what those rules really were, and still more difficult to reconcile the differences which so constantly arose between the expounders of Mahomedan law, ordinarily current in India, namely, Abu Hanifa and his two disciples.

The rule of Mahomedan law, that no gift could be valid unless the subject of it was in the possession of the donor at the time when the gift was made, though undoubtedly laid down in several works of more or less authority, must, so far as it related to land,

have relation to cases where the donor professed to give away the possessory interest in the land itself and not merely a reversionary right in it. Of course the actual seizin or possession could not be transferred, except by him who had it for the time being. What was usually called possession in this country, was not *actual* or *khas possession*, but the receipt of the rent and profits. Lands, therefore, let out on lease, could be made the subject of a gift under Mahomedan law.

The rule of Mahomedan law, that a gift of an undivided share in property was invalid, on the ground of *Musha* or confusion on the part of the donor, and that a gift of property to two donees, without first dividing their shares, applied only to such properties which were capable of division or partition—*Mullick Abdool Guffoor v. Muleka*, I. L. R., 10 Cal., 1112, *per* Garth, C. J. (1884).

According to Mahomedan law of gift, a request to attorn to the donee is sufficient delivery and possession of the property—*Shaik Ibhran v. Shaik Suleman*, I. L. R., 9 Bom., 146 (1884).

The principles of Mahomedan law prohibit indefinite gifts and gifts *in futuro* exclude the validity of such to take effect at an indefinite future time—*Chekkonekutti v. Ahmed*, I. L. R., 10. Mad., 196 (1886).

Where possession is transferred by a donor to a donee in pursuance of a deed of gift previously executed, the provisions of Mahomedan law are satisfied.—*Anwari Begam v. Nizamuddin*, I. L. R., 21 All., 165 (1898).

Mahomedan law requires that the donor should be in actual or at least constructive possession and that he should give actual or at least constructive possession to the donee.—*Ismael v. Ramji*, I. L. R., 23 Bom., 682 (1899).

Where a Mahomedan did not execute any formal transfer of a certain property to his wife but merely presented a petition to the Revenue Court, in which he stated he had transferred his rights and interests to his wife, held, that it was not a valid gift according to Mahomedan law—*Mumtaz-un-nissa v. Tofail Ahmad*, I. L. R., of 28 All., 264 (1905).

A Mahomedan holder of property may in his life-time give away the whole or part of his property if he complies with certain forms; but it is incumbent upon those who seek to set

up such a transaction to show very clearly that those forms have been complied with. It may be by deed of gift simply, or by deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter (in which case delivery of possession is not necessary) actual payment of the consideration must be proved and the *bonâ fide* intention of the donor to divest himself *in præsentî* of the property, and to confer upon the donee must also be proved—*Chaudhuri Mehdi Hasan v. Muhammad Hasan*, 10 W. N., 706, P. C. (1906).

See Section 129 of the Transfer of Property Act (IV of 1882).

Persons to
whom a gift
may be
made.

Art. 438. Any owner, capable of disposing of his property, can give the whole or part of it to an ascendant, a descendant, a collateral relation, or a stranger even of a different religion, provided always that the conditions requisite for the validity of a gift are fulfilled.

Notes.

Kurat-ul-Ayoon, Vol. 2, pp. 307, 308.

Zaidu-nil-Ambani, Vol. 2, p. 236.

Of what a
gift may
consist.

Art. 439. A gift may consist of the usufruct of property in favour of the donee, during his lifetime with the condition that the property is returned to the donor or to his heirs, should the donee die first.

A *donatio mortis causa* is void and of no effect. Things thus given become the property of the donor's heirs, but can be left with the donee by way of loan.

Notes.

Jawahir-i-Nayera, Vol. 2, p. 14; Fatawa-i-Alam-giri, Vol. 5, p. 228; Fatawa-i-Kazi Khan, Vol. 4, p. 297.

Zaidu-nil-Ambain, Vol. 2, p. 237.

Where the quantity of the consideration in a gift is undefined and unknown, the deed is inoperative according to Mahomedan law—*Aiman Bibi v. Ibrahim*, 5 Sel. Rep., 355 (1833).

Where a gift of the whole property is made in favour of only one donee, according to Mahomedan law, specification of the property is not requisite—*Sahebun v. Khoda Buxsh*, 6 Sel. Rep., S. D. A., 51 (1835).

It is quite clear that under Mahomedan law, a *donatio mortis causa* is not effectual as a gift, but only as a will and that to render a gift valid it must be accompanied by delivery of possession—*Meer Ashruff Ally v. Nusebun Bebee*, 2 Hay, 163 (1863).

According to Mahomedan law a gift of property which is not to take effect till the death of the donor is null and void. The courts in this country have invariably applied in practice the Mahomedan law to a variety of cases other than those coming under the denomination of inheritance, marriage and caste and whenever they administered Mahomedan law to Mahomedans, they administered justice according to equity and good conscience—*Zohorooddeen v. Baharoolla*, W. R., Sup. Vol., 185 (1864).

Under Mahomedan law a gift made in contemplation of death though not operative as a gift operates as a legacy—*Ekin Beebee v. Ashruf Ali*, 1, W. R., 152 (1864).

Where a deed of gift expresses in plain language the specific shares of the property and that the gift was made in lieu of the whole dower, there can be no room for doubt as to the meaning and intention of the contracting parties in regard to the particular subjects either of the gift or of the consideration—*Sahiba Begum v. Atchamma*, 4 Mad. H. C. R., 115 (1868).

Where the interest of each of the donees is not defined by an instrument, the gift is bad according to Mahomedan law—*Sayad Valimia v. Gulam Kadr*, 6 Bom. H. C. R., 25, *per* Couch, C. J. (1869).

Where a Mahomedan made a gift of certain villages in favour of his sister-in-law and declared that she might manage the said villages for herself and apply their income to meet her necessary expenses and pay the Government revenue, held, that the gift was a *hiba-bil-ewaz* or gift for a consideration, and the villages belonged to her absolutely—*M. Faiz Ahmed Khan v. Ghulam Ahmad Khan*, I. L. R., 3 All., 490 ; L. R., 3 I. A., 25 (1881).

Where a Mahomedan made a gift of a house to a certain person for the purpose of residence, held, that the meaning of such

a conveyance being perfectly clear the donee took the property absolutely. Where the Sunni law is distinct and the Shia law is silent on a subject; the intention in the latter system is to adopt the Sunni rule to Shias—*Nasir Husain v. Sughra Begam*, I. L. R., 5 All., 505, *per* Stuart, C. J. (1883).

Where there was a gift in effect of a portion of the future revenues of certain villages to the extent of Rs. 4,000 *per annum*, it was held to be invalid according to Mahomedan law. A gift cannot be made of any thing to be produced in future although the means of its production may be in the possession of the donor. The subject of the gift must be actually in existence at the time of the donation—*Amtul Nissa v. Mir Nurudin*, I. L. R., 22 Bom., 489, *per* Farran, C. J. (1896).

SECTION II. PROPERTY THAT MAY BE LAWFULLY GIVEN.

(Arts. 440—446.)

Gift of undivided share in property (*Musha*).

Art. 440. The gift of an undivided share in any property, not by its nature divisible, transfers the ownership by delivery of possession provided the undivided share is known and specified (*Musha*).

Property is held to be indivisible when it admits of no division or when division would render it altogether unfit for use, or unfit for the use for which it was destined before division.

Notes.

Koodoori, p. 136; Fatawa-i-Alamgiri, Vol. 5, p. 229; Kurat-ul-Ayoon, Vol. 2, p. 323.

Baillie, Bk. 8, Chap. 1, p. 508; Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 1, p. 483; Zaidunil-Ambani, Vol. 2, p. 239.

It is a well known maxim of Mahomedan law, that to render a gift valid it is necessary that the subject of it be defined, and distinct and separated from all other property not intended to be conveyed or which cannot lawfully be conveyed by gift—*Meer Ubdool Kureem v. Fakhroonisa Begum*, 3 Sel. Rep., S.D.A. 60 (1820).

By Mahomedan law a gift is vitiated by confusion—*Majidah v. Muhammad Ali*, 5 Sel. Rep., S.D.A., 162 (1831).

According to the Shia School of Mahomedan law, the gift of undivided property is valid—*Kasim Ali v. Muhammad Hosen*, 5 Sel. Rep., S. D. A., 253 (1832).

Mahomedan law recognizes distinction between gift for a consideration, and gift on condition of a return. One is, and the other is not, vitiated by confusion and non-possession—*Imdad Ali v. Kadir Baksh*, 5 Sel. Rep., S. D. A., 345 (1833).

One of two sharers can, under Mahomedan law, give over his share to the other even before partition—*Ameena Bibee v. Zeifa Bibee*, 3 W. R., 37 (1865).

Where a deed of gift executed by a Mahomedan purported to give to one of his sons one-third of his property, and which was without consideration and unaccompanied by delivery of possession and intended to operate after the donor's death, held, that it was invalid according to Mahomedan law—*Khujooroonissa v. Roushun Jehan*, L. R., 3 I. A., 291 (1876).

A defined share in a landed estate is a separate property to the gift of which the objection, under Mahomedan law, regarding gift of joint and undivided property, does not apply—*Jivan Bakhsh v. Imtiaz Begam*, I. L. R., 2 All., 93 (1878).

A gift of part of a thing which is capable of division is not valid unless the said part be divided off and separated from the property of the donor, but a gift of part of an indivisible thing is valid according to Mahomedan law—*Kasim Husain v. Sharif-un-nissa*, I. L. R., 5 All., 285 (1883).

Where the object of the gift is an undivided moiety of a house, which had not been partitioned and the donee is not a co-sharer but a third person, such gift is invalid under Mahomedan law—*Emnabai v. Hajirabai*, I. L. R., 13 Bom., 352 (1888).

According to Mahomedan law, where there are three sharers of a certain property, one may give his share to either of the other two before division.

Where a gift authorizes the donee to take possession of the property, and the donee subsequently takes possession of it, the gift is valid, although the donor was not in possession at the time when the gift was made—*Mahomed Buksh Khan v. Hosseini Bibi*, L. R., 15 I. A., 81 ; I. L. R., 13 Cal., 684 (1888).

The doctrine relating to the invalidity of gift of *Musha* under Mahomedan law is wholly unadopted to a progressive state of society, and ought to be confined within the strictest rules ; but possession taken under an invalid gift of *Musha* transfers the property according to the doctrines of both the Sunni and Shia Schools—*M. Mumtaz Ahmad v. Zubaida Jan*, I. L. R., 11 All., 460, P. C. (1889).

The validity of a gift was not a question regarding succession, inheritance, marriage or caste, or any religious usage or institution, and therefore the rules of Mahomedan law with regard to gifts are not necessarily the rules by which the Madras Courts should decide such a question.

The rule of Mahomedan law with regard to *Musha* is that a gift of an undivided share in a subject capable of division is not good because it would lead to confusion—*Alabi Koya v. Mussa Koya*, I. L. R., 24 Mad., 513 (1901).

Art. 441. The gift of an undivided share in any divisible property, in favour of even a co-parcener does not transfer ownership in spite of delivery of possession, unless the share given is divided and separated from that part which is not given, nor must the part which is not given be immediately joined to the other part, nor must it be occupied by other property of the donor. Property is held to be divisible, when it admits of division, without depreciation, and when it can be used after division in the same way as before.

Notes.

Jawahir-i-Nayera, Vol. 2, p. 8; Fatawa-i-Alamgiri, Vol. 5, pp. 229, 230, 232; Hidayat, Vol. 3, p. 269; Fatawa-i-Kazi Khan, Vol. 4, 282.

Zaidu-nil-Amvani, Vol. 2, p. 239.

According to Mahomedan law a gift of a portion of any landed property without distinct allotment of it, and delivery of

How ownership is transferred in a gift of an undivided share of divisible property.

possession to the donee, is invalid—*Azeemodin v. Fatima Beebee*, 1 Sel. Rep., S D.A., 31 (1799).

To render a gift valid, it is necessary that the property given be divided off from the shares of co-parceners, and complete possession be given—*Kishwar Khan v. Jewun Khan*, 1 Sel Rep., S. D. A., 33 (1799).

Where a Mahomedan lady made a gift of certain undivided shares of her property, which was under a mortgage, in favour of a person, and the produce of the shares was applied during her lifetime after the gift just as it had been before the gift, *viz.*, part to her creditors and part to the maintenance of the donor herself, held, that there was no such surrender and delivery of the property given to the donee as is requisite to make a valid gift according to Mahomedan law—*Khader Hussain Sahib v. Hussain Begum Sahiba*, 5 Mad. H. C. R., 114 (1869).

The general rule of Mahomedan law is that anything which is capable of division, when given to two persons, should be divided by the donor at the time of the gift, or immediately subsequent thereto and prior to the delivery to the donee, in order that the objection of confusion (*Musha*) may be avoided, and full and complete seizin obtained—*Nezam-ud-din v. Zaheda Bibi*, 6 N. W. P., H. C. R., 338 (1874).

Where there is a *bonâ fide* intention on the part of the father to make a gift in favour of his minor son, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of such minor.

The principle of the rule of Mahomedan law that the gift of *Musha*, or an undivided part in property capable of partition, was invalid, does not apply to definite shares in Zamindaries, which are in their nature separate estates, with separate and defined rents—*Ameeroonissa v. Abedoonissa*, L. R., 2 I. A., 87 (1874).

Where possession was changed in conformity with the terms of a gift, that change of possession would be sufficient to support the gift, even without consideration according to Mahomedan law—*Kamarunnissa Bibi v. Hussaini Bibi*, I. L. R., 3 All., 266, P. C. (1880).

Possession is necessary to make a gift perfect, where the nature of the transaction was such that possession is possible.

Accordingly, where the right to receive pension was assigned over by a deed to the donee, held, it was a valid gift.

Where the donor's interest was separate, the principle of *Musha* or undivided part, was not applicable—*Sahib-un-nissa Bibi v. Hafiza Bibi*, I.L.R., 9 All., 213, *per* Edge, C. J. (1887).

Mahomedan law relating to *Musha* ought to be confined within strictest rules. It does not apply to gifts of definite shares of Zamindaries or to a definite share of the moneys in the hands of the Accountant-General—*Ebrahimhai v. Fulbai*, I.L.R., 26 Bom., 577 (1902).

Where the property is joined to other property of the donor but is capable of being divided.

Art. 442. Where the property given is by nature joined to any other property of the donor, and the donor occupies either property and the property is capable of being divided, the gift is only valid when the donor has made the division and given delivery of possession to the donee, or the latter, authorized by the donor, has effected the division and taken possession.

Where the property given is joined to any other property of the donor, and is occupied, the gift is void, unless such property has first been separated from the property not given.

The gift is valid if the property given is occupied by property not given, and ownership is transferred by delivery of possession even without separation.

The donee who receives undivided property, given to him while it is occupied and not separated, cannot validly dispose of it. He is responsible for any loss occasioned by his own action, by accident or by use. The donor or his heirs can dispose of or recover such undivided property, even when the gift is made in favour of a relation within the prohibited degrees.¹

¹ See Art. 22.

Notes.

Kurat-ul-Ayoon, Vol. 2, pp. 320, 325 ; Fatawa-i-Alamgiri, Vol. 4, pp. 231, 232.

Baillie, Bk. 8, Chap. 2, p. 512 ; Zaidunil-Ambani, Vol. 2, p. 243.

In Mahomedan law, a necessary condition of gift is, that property given be not attached to, or included in, the property of another (so as to be undefined) ; and if it be land, that the partition be determined by known boundaries ; in which case alone gift is perfect—*Jafier Khan v. Hubshee Bebee*, 1 Sel. Rep., S. D. A., 16 (1796).

According to Mahomedan law, divisible property must either be divided at the time when gift thereof is made to two persons, or the donor must, immediately after the gift has been made and before the property has been actually made over, divide and present it to the donees, in order that the objection of confusion (*Musha*) may be avoided and full and complete seizin obtained, which is essential to the validity of a gift—*Khanum Jan v. Jan Beebee*, 4 Sel. Rep., S. D. A., 266 (1827).

A deed of gift, comprising Zamindari and other property, of which the donor was in receipt of rent and profits, was held to be a valid gift in favour of the donee according to Mahomedan law—*Sajjad Ahmad v. Kadri Begam*, I. L. R., 18 All., 1 (1895).

Art. 443. That which is not considered to have a separate existence cannot be made the subject of a valid gift, such as the flour in growing wheat, the oil in sesame, and the butter in milk.

Gift of that which is not considered to have a separate existence.

Notes.

Bahrr-ul-Rayek, Vol. 7, p. 312 ; Fatawa-i-Alamgiri, Vol. 5, p. 228.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 1, p. 484 ; Zaidunil-Ambani, Vol. 2, p. 245.

Gift of an undivided share in divisible property is only valid when made with the consent of all the co-owners.

Art. 444. Any gift of an undivided share in property capable of partition although still in an undivided state is valid, so long as the gift is made in the name of all the co-owners.

Such a gift cannot be made in favour of two persons in easy circumstances, unless there is a previous partition specifying the share of each donee. This class of gift however is valid if made in favour of two poor persons.

Notes.

Kurat-ul-Ayoon, Vol. 2, p. 335 ; Fatawa-i-Alamgiri, Vol. 5, pp. 230, 231 ; Radd-ul-Muhtâr, Vol. 4, p. 565.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 1, p. 485 ; Zaidunil-Ambani, Vol. 2, p. 245.

Creditor can validly make a gift of his debt to the debtor.

Art. 445. A creditor can validly make a gift of his debt to the debtor. Such a gift is complete without acceptance on the part of the donee, unless the latter actually refuses to be released from the debt.

Notes.

Fatawa-i-Alamgiri, Vol. 5, p. 234 ; Durrul-Mukhtâr, Vol. 3, p. 107.

Baillie, Bk. 8, Chap. 3, pp. 522, 523 ; Zaidunil-Ambani, Vol. 2, p. 247.

When gift of a debt to anybody but the debtor is void.

Art. 446. Any gift of a debt in favour of anybody except the debtor is void, unless it is an assignment of a debt or a legacy, or consists in powers given to the donee to recover such debt and to keep what he so recovers.

Notes.

Durrul-Mukhtâr, Vol. 3, p. 107; Fatawa-i-Alamgiri, Vol. 5, p. 234.

Zaidu-nil-Ambani, Vol. 2, p. 248.

See Section 131 of the Transfer of Property Act (IV of 1882).

SECTION III.—PERSONS CAPABLE OF RECEIVING A GIFT.

(Arts. 447—449.)

Art. 447. A gift made in favour of a minor by the latter's executor or guardian is complete by the mere act of giving.

A gift to a minor by his guardian is complete by the mere act of giving.

Where the donor is the father or the mother or any other person having authority over the child, possession of the gift may be taken on the minor's behalf by such person.

Where the gift is composed of divisible property it must be actually in the possession of the donor or in deposit, or with a partner; it must not be in the hands of a mortgagee, pledgee or person holding it wrongfully.

A gift made to an adult is only valid when it is received by the donee during the donor's lifetime either in person or by an agent.

Notes.

Kurat-ul-Ayoon, Vol. 2, pp. 329, 330; Fatawa-i-Alamgiri, Vol. 5, pp. 238, 239.

Zaidu-nil-Ambani, Vol. 2, p. 249.

A gift made by a father to a son not of age, although possession of the subject given be not delivered to the son, is valid, according to Mahomedan law, on the presumption, that the father was trustee for his minor son—*Newazee Feraush v. Atlussee*, 1 Sel. Rep., S. D. A., 41 (1800).

The general rule of Mahomedan law, no doubt, requires that, to make a gift valid and effectual, the intention to give should be demonstrated by a relinquishment of the thing given and an acceptance thereof by the donee. This is the rule between strangers. A gift of property by a father to his minor son is not governed by the above rule. A seizin by the guardian of a minor is sufficient for the minor and if the guardian is himself the donor and in possession of the property, no formal delivery and seizin is required—*Wajeed Ali v. Abdool Ali*, W. R., Sup. Vol. 121, *per* Morgan, J. (1864).

By Mahomedan law, it is not necessary that possession should follow so as to complete a gift to an infant child—*Gyaz-ood-deen v. Fatima*, 1 Agra H. C. R., 238 (1866).

A deed of gift executed by a Mahomedan lady in favour of certain persons standing in a fiduciary relation to her is not valid—*Rujabai v. Ismail Ahmed*, 7 Bom. H. C. R., 27 (1870).

Where there is on the part of the father of a minor a *bonâ fide* intention to make a gift to the minor, the provisions of Mahomedan law are satisfied without actual change of possession and it would be presumed that the subsequent holding of the father is on behalf of the minor—*Hussain v. Mira*, I. L. R., 13 Mad., 46 (1889).

According to Mahomedan law a father can make a valid gift in favour of his son with a reservation by the donor for himself, but where the donee does not become the exclusive owner of the property, the gift is invalid—*Ibrahim Ali Khan v. Ummat-ul-Zohra*, I. L. R., 19 All., 267, P. C. (1896); L. R., 24 I. A., 1.

Where a Mahomedan executed a deed of gift in favour of her niece and subsequently sought to have it cancelled on the ground that possession of the subject of the gift was not given, held, that in the absence of fraud there was no reason to cancel a deed which had no existence in Mahomedan law—*Umrao Bibi v. Jan Ali Shah*, I. L. R., 20 All., 465 (1898).

Where the uncle of a minor Mahomedan girl relinquished in her favour a certain share in a property to which he was

entitled, and the Collector undertook the responsibility of management of the minor's property, held, that relinquishment of such share was not a mere gift according to Mahomedan law but a transfer of property, supported by consideration which was valuable—*Mahammadunissa Begum v. Bachelor*, I. L. R., 29 Bom., 428 (1905).

Where the donor was an aunt of the donee, and the donee had been brought up and treated by her as a son, and the intention of both the donor and donee was that the donor should continue to reside with the donee, and under the circumstances it would have been a mere empty formality for the donor to have left the house and removed therefrom all her goods and chattels for the purpose of completing the gift and then immediately to have returned to it, and where the donor in the most clear and emphatic language divested herself of all her interest in the property the subject-matter of the gift, held, that according to Mahomedan law the gift was a complete and perfect gift—*Humera Bibi v. Najm-un-nissa*, I. L. R., 28 All., 147 (1905).

Art. 448. Any person having legal authority over a minor may take possession of a gift made by a stranger in the minor's favour.

Any person having legal authority over a minor may take possession of a gift made in minor's favour.

When a minor has reached the age of reason, he can validly receive a gift even though his father is alive.

Notes.

Durrul-Mukhtâr, Vol. 3, p. 103 ; Fatawa-i-Alam-giri, Vol. 5, pp. 239, 240.

Zaidu-nil-Ambani, Vol. 2, p. 252.

By Mahomedan law a gift by a father of property in favour of his son was complete without delivery. It became the son's from the date of the transaction, and if possession had not been delivered, there would have been a right to take it, or during his minority any member of his family could have done so for him—*Hussain Khan Bahadur v. Nateri Srinivasa*, 6 Mad. H. C. R., 356 (1871).

Husband
can validly
receive a
gift made in
favour of his
minor wife.

Art. 449. After the celebration of marriage, a husband can receive a gift made in favour of his minor wife even though she has a father living. He cannot, however, validly do so before the celebration of the marriage, nor after she has attained her majority.

Notes.

Durrul-Mukhtâr, Vol. 3, p. 104; Fatawa-i-Alam-giri, Vol. 5, pp. 239, 240.

Zaidunil-Ambani, Vol. 2, p. 253.

SECTION IV.—REVOCATION OF GIFTS.

(Arts. 450—464.)

Where a
donor can
revoke a
gift.

Art. 450. A donor can revoke a gift either wholly or in part, even when he has renounced the right of revocation, except in the cases mentioned in the following Articles.

Notes.

Durrul-Mukhtâr, Vol. 3, p. 104; Fatawa-i-Alam-giri, Vol. 5, pp. 235, 238; Kurat-ul-Ayoon, Vol. 2, p. 338.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 2, p. 485; Zaidunil-Ambani, Vol. 2, p. 254.

As to donor's right to revoke a gratuitous allowance for life given to a stranger—1 Mad. Dec. 118 (1814).

Revocation
of gift where
there is
increase in
the gift
itself.

Art. 451. Revocation is not lawful where there is an increase of the thing given of such nature as to be united to it, and which enhances the value of such gift.

Where the increase is not united to the gift, there is no obstacle to revocation, whether such increase is

derived directly from the gift or not. The same rule applies in the case of a rise in value of the thing given.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 566 ; Fatawa-i-Alam-giri, Vol. 5, pp. 235, 240 ; Bahrr-ul-Rayek, Vol. 7, p. 320 ; Kurat-ul-Ayoon, Vol. 2, pp. 340, 354.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 2, p. 486 ; Zaidunil-Ambani, Vol. 2, p. 256.

Art. 452. The death of one of the parties to the gift after delivery of possession bars the right of revocation.

Death of either party after delivery of gift bars the right of revocation.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 566 ; Fatawa-i-Alam-giri, Vol. 5, pp. 235, 240 ; Bahrr-ul-Rayek, Vol. 7, p. 320 ; Kurat-ul-Ayoon, Vol. 2, pp. 340, 354.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 2, p. 486 ; Zaidunil-Ambani, Vol. 2, p. 258.

Art. 453. The right of revocation is also forfeited when the donee has definitely disposed of the gift ; but it continues to exist when no definite disposal has taken place. Where the donee has sold a part of the property constituting the gift, the donor can revoke the remainder.

Right of revocation is also forfeited if the donee has disposed of the gift.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 566 ; Fatawa-i-Alam-giri, Vol. 5, pp. 235, 240 ; Bahrr-ul-Rayek, Vol. 7, p. 320 ; Kurat-ul-Ayoon, Vol. 2, pp. 340, 354.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 2, p. 486 ; Zaidunil-Ambani, Vol. 2, p. 258.

Gift by
husband to
wife and
vice versa.

Art. 454. A gift made by the husband and accepted by the wife either before or after the celebration of the marriage is irrevocable, nor can it be revoked after the marriage is dissolved.

A wife can give the husband a house containing furniture belonging to her, and although the house is thus occupied with goods belonging to her, the gift is valid.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 566 ; Fatawa-i-Alam-giri, Vol. 5, pp. 235, 240 ; Bahrr-ul-Rayek, Vol. 7, p. 320 ; Kurat-ul-Ayoon, Vol. 2, pp. 340, 354.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 2, p. 486 ; Zaidunil-Ambani, Vol. 2, p. 259.

Where a Mahomedan husband made a *hiba-bil-ewaz* in favour of his wife, gave her possession of the property, when he was not in debt, nor did he intend to defraud creditors, held, the gift was valid according to Mahomedan law—*Doe dem Ramtonoo v. Bibee Jeenut*, 1 Fulton, 152, *per* Peel, C. J. (1843).

A wife may, according to Mahomedan law, hold property independent of her husband, and as a husband may make a valid gift to his wife, it can only be necessary that a gift should be accompanied with such a change of possession as the subject is capable of, and as is consistent with the continuance of the relation of husband and wife—*H. H. Azim-un-Nissa Begum v. Clement Dale*, 6 Mad. H. C. R., 455 (1868).

In order to render a gift by a Mahomedan husband to his wife in lieu of dower valid, it was necessary that it should be accompanied with such a change of possession as the subject was capable of, and as was consistent with the continuance of the relations of husband and wife. Transfer of seizin is unnecessary in a *hiba-bil-ewaz* or gift for consideration. Where a transaction by way of *hiba-bil-ewaz* is shown to be a real transaction and it is unaffected by undue influence, fraud or the like, all that has to be shown to support the transaction, is the actual passing of consideration agreed to be given—*Muhammad Esuph v. Pattamsa*, 1. L. R., 23 Mad., 70 (1899).

The acts essential for giving validity to a *hiba* or gift according to Mahomedan law are tender, acceptance, and "seisin," but the manner in which seisin is to be effected must be considerably modified, to suit the peculiar relations recognised as existing between husband and wife in the Mahomedan community. The property of each is separated and independent of the other ; either can make, and both are encouraged by law to make, gifts to the other, in order "to promote mutual affection," and so strongly is this principle inculcated that retraction of such a gift is not allowed, although in many other cases it is lawful. A wife can make to her husband a valid gift of the house in which both are residing, although it contains her separate property, and though both continue to reside in it afterwards. Upon principle a husband is equally at liberty to bestow upon his wife the house in which both are living, and in which they afterwards continue to reside, provided he has power to make the gift, and do make it *bonâ fide* and not in contemplation of fraud upon creditors or others. The only difficulty is to comply with the exigency of the law, which requires "seisin" or exclusive possession to be given. If a husband with full power to give executes a deed of gift, and in accordance with its provisions hands over symbolical possession of a house or property by keys, &c., and also to mark more strongly the *bonâ fides* of the intention, actually goes out of the house before witnesses in order to leave it and all within it in the full and exclusive possession of his wife, no further act is necessary to give effect to that gift consistently with exercising his other legal rights as a husband. A wife has at that time the power afforded to her of taking and keeping exclusive possession of the gift, and of continuing to reside in the house, but Mahomedan law gives the husband the right, and moreover makes it his duty to reside with his wife.

The "seisin" under Mahomedan law appears to be analogous to the livery of "seisin" as formerly existing in England, and to have been effected much in the same way as by a delivery of a sod or twig of the land, or the ring or hasp of a door, in the name of "seisin." In Coke on Littleton 57a it is laid down "If the deed be delivered in the name of 'seisin' of the land, or if the feoffor (or donor) saith to the feoffee (or donee) take and enjoy this land according to the deed, or enter into this land, and God give you joy, these words do amount to a livery of "seisin."

The relation of husband and wife, and his legal right to reside with her and to manage her property, rebut the inference which in the case of parties standing in a different relation would arise from a continued residence in the house after the making of the *hiba*, and in the husband generally receiving the rents accruing to that house—*Amina Bibi v. Khatija Bibi*, 1 Bom. H. C. R., 157, *per* Sausse, C. J. (1864).

Irrevocable
gifts.

Art. 455. Every gift made in favour of a relation within the prohibited degrees,¹ whether Christian or Jew, subject to Muslim authority or not, or living in a Muslim State or elsewhere is irrevocable.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 566 ; Fatawa-i-Alam-giri, Vol. 5, pp. 235, 240 ; Bahrr-ul-Rayek, Vol. 7, p. 320 ; Kurat-ul-Ayoon, Vol. 2, pp. 340, 354.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 2, p. 486 ; Zaidunil-Ambani, Vol. 2, p. 260.

Where a Mahomedan made a remission of rent for three years, such remission would be complete at the termination of each year respectively ; in other words, delivery of the gift was made to the donee, and Mahomedan law, although allowing revocation of gifts at any time before delivery, is precise as to the impossibility of revoking a gift after delivery without the consent of the donee—*Enaet Hossein v. Khoobunmissa*, 11 W. R., 320 (1869).

Right of
revocation is
forfeited if
gift is lost
while in
donee's
possession.

Art. 456. The right of revocation is forfeited if the gift is lost while in the donee's possession, whether such loss is occasioned by any act of the donee, by accident, or by use. Where there is a partial loss, the right of revocation exists over the remainder.

¹ See Art. 22.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 566 ; Fatawa-i-Alam-giri, Vol. 5, pp. 235, 240 ; Bahrr-ul-Rayek, Vol. 7, p. 320 ; Kurat-ul-Ayoon, Vol. 2, pp. 340, 354.

Zaidu-nil-Ambani, Vol. 2, p. 260.

Art. 457. Where, after a gift is made, the donee offers some specified compensation (*ewaz*) which the donor accepts, the latter can no longer revoke the gift: Provided that the compensation offered is not a part of the gift itself.

Gift cannot be revoked where it is made with compensation (*ewaz*).

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 566 ; Fatawa-i-Alam-giri, Vol. 5, pp. 235, 240 ; Bahrr-ul-Rayek, Vol. 7, p. 320 ; Kurat-ul-Ayoon, Vol. 2, pp. 340, 354.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 2, p. 486 ; Zaidu-nil-Ambani, Vol. 2, p. 261.

Where a Mahomedan lady in exchange for certain ornaments made a gift of half of her property in favour of a person, on condition that the latter should not alienate it but leave it to two other persons named in the *hibanamah*, held, that according to Mahomedan law the gift by her of the property in consideration of the ornament, amounted to a sale ; that such sale was good and valid and could not be vitiated by the conditions specified in the deed of conveyance—*Mirza Beebee v. Toola Beebee*, 4 Sel Rep., S. D. A., 425 (1829).

A gift for a consideration is in effect a sale and purchase under Mahomedan law not vitiated by confusion of property or defect of possession—*Syud Hussain Ali v. Fiyaz Uddin*, 5 Sel. Rep., S. D. A., 283 (1832).

A revocation of a gift without consideration is valid according to Mahomedan law unless the donee made additions to the subject of the gift or transferred the possession to another—

Shah Makdum Bakshsh v. Lutf Ali, 5 Sel. Rep., S. D. A., 416 (1834).

A *hiba-bil-ewaz* or a gift for consideration made in contemplation of marriage is valid under Mahomedan law—*Kulsoon v. Ameerunnissa*, 1 Hyde, 150 (1862).

According to Mahomedan law a *hiba-bil-ewaz* is different from an out-and-out sale and gift. It partakes of the character of both, and where there is sufficient consideration, it is valid—*Solah Bibee v. Keerun Bibee*, 16 W. R., 175 (1871).

The fundamental conception of a *hiba-bil-ewaz* in Mahomedan law is that it is a transaction made up of two separate acts of donation, that is, it is a transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor of one gift and the donee of the other.

For the validity of a gift under Mahomedan law, possession of the gifted property by the donor at the time of the gift, or at least at some time, so as to enable him to deliver possession to the donee, is a condition indispensable—*Rahim Bakhsh v. Muhammad Hasan*, I. L. R., 11 All., 1, *per* Mahmood, J. (1888).

Where donor is deprived of the compensation.

Art. 458. Where the donor is deprived of the compensation made in respect of a gift, he can revoke the whole gift, if it exists in kind and there be no increase or other impediment that prevents revocation.

Where the donee is deprived of a gift, he can recover the compensation he gave, if it exists in kind. In case of its loss he can claim something of like nature, or he can claim the value of the gift.

Notes.

Durrul-Mukhtâr, Vol. 3, p. 105 ; Fatawa-i-Alam-giri, Vol. 5, p. 240.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 2, pp. 486, 487 ; Zaidunil-Ambani, Vol. 2, p. 262.

Art. 459. Where a person has made a gift of property belonging to another, which perishes while in the donee's possession, and the owner demands return of the property and the donee pays him compensation for the same, the latter cannot recover the compensation he has paid from the donor.

Where gift perishes.

Notes.

Durrul-Mukhtâr, Vol. 3, p. 106.

Zaidu-nil-Ambani, Vol. 2, p. 264.

Art. 460. In no case can a father pay compensation out of the property of his minor child, who is the donee.

Father cannot pay compensation out of his minor child's property.

Notes.

Durrul-Mukhtâr, Vol. 3, p. 105.

Zaidu-nil-Ambani, Vol. 2, p. 265.

Art. 461. A gift made in favour of a poor man and taken possession of by him is irrevocable.

A gift in favour of a poor man is irrevocable.

Notes.

Jawahir-i-Nayera, Vol. 2, p. 15 ; Fatawa-i-Alam-giri, Vol. 5, p. 238.

Zaidu-nil-Ambani, Vol. 2, p. 265.

Art. 462. A gift is rescinded either by a mutual agreement between the parties concerned, or by the judge. If the donor seizes the thing given without either a decree or the donee's consent, he is answerable to the donee for any loss occasioned by his own act, accident or use.

How revocation is effected.

After the donor has obtained an order for revocation from the judge and has given notice thereof to the donee, the latter becomes liable for any loss occasioned to the gift while it is in his possession.

Notes.

Kurat-ul-Ayoon, Vol. 2, p. 355 ; Fatawa-i-Alamgiri, Vol. 5, pp. 235, 238.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 2, p. 487 ; Zaidunil-Ambani, Vol. 2, p. 265.

Where gift
is made with
compensa-
tion.

Art. 463. When a gift is made, subject to compensation being given and such compensation is fixed at the time the gift is made, the gift is only valid when delivery has been made on both sides : such a gift is invalid when the objects comprising the compensation are not separated though capable of being so.

This reciprocal delivery in each case transfers the ownership, and the transaction is equivalent to an exchange, and is subject to the laws governing sales. Such transaction can therefore be annulled for latent defects in the contract or in the objects it deals with, and either party is entitled to withdraw from it.

Where neither party makes delivery or only one does so, the right of revocation remains open to both parties.

Notes.

Kurat-ul-Ayoon, Vol. 2, pp. 357, 358 ; Fatawa-i-Alamgiri, Vol. 5, pp. 240, 241.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 2, p. 488 ; Zaidunil-Ambani, Vol. 2, p. 267.

Art. 464. A charitable gift is subjected to the same conditions as an ordinary gift. Ownership is only transferred by delivery.

A charitable gift is like an ordinary gift.

Notes.

Durrul-Mukhtâr, Vol. 3, p. 107 ; Fatawa-i-Alamgiri, Vol. 5, p. 248.

Zaidu-nil-Ambani, Vol. 2, p. 268.

A gift of a fund "to be disposed of in charity as my executor shall think right ;" is a valid charitable bequest according to Mahomedan law—*Gangbai v. Thavar Mulla*, 1 Bom. H. C. R., 71 (1863).

CHAPTER II.

WILLS.

(Arts. 465—505.)

SECTION I.—THE NATURE OF A WILL : THE CONDITIONS REQUISITE FOR ITS VALIDITY : PERSONS CAPABLE OF MAKING A WILL.

(Arts. 465—481.)

Art. 465. A will is the act by which a person, while living, gratuitously transfers the ownership of his property, such transfer not to take place until after his death.

Definition of a will.

Notes.

Bahrr-ul-Rayek, Vol. 8, p. 459.

Baillie, Bk. 10, Chap. 1, p. 613 ; Zaidu-nil-Ambani, Vol. 2, p. 269.

Where a Mahomedan affixes his signature to a will as a consenting party, such will is valid under Mahomedan law—*Khadejah Beebee v. Suffer Ali*, 4 W. R., 36 (1865).

By Mahomedan law a will need not be in writing, and it is found that the deceased expressed her will, and that it was her last will, the omission to put it into writing, will not deprive it of legal effect—*Tameez Begum v. Furhut Hossein*, 3 N. W. P., H. C. R., 55 (1870).

The policy of Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up such a proceeding to shew very clearly that the forms of Mahomedan law, whereby its policy is defeated, have been complied with—*Khujooroonissa v. Roushun Jehan*, L. R., 3 I. A., 291 (1876).

Where a Mahomedan lady by her will directed that the monthly allowance granted to her by Government should be paid to certain persons after her death, held, that it was a good bequest under Mahomedan law—*Prince Suleman Kadr v. Darab Ali Khan*, L. R., 8 I. A., 117 (1881).

Where a Mahomedan by his will gave certain talookdari estate to his grandson, the latter took a heritable interest in it—*Faiz Muhammad Khan v. Muhammad Saeed Khan*, L. R., 25 I. A., 77 ; I. L. R., 25 Cal., 816 (1898).

Where a Mahomedan lady made a will which was not signed by her or any one on her behalf, yet the document represented her real will, held, that according to Mahomedan law, a will may be made either verbally or in writing, and no special form or solemnity for making or altering a will is prescribed—*Aulia Bibi v. Ala-ud-din*, I. L. R., 28 All., 715 (1903).

See *Mogul Begum v. Fukeerun Beebee*, 3 N. W. P., H. C. R., 288 (1866) ; *Khajoorunnissa v. Roheemannissa*, 17 W. R., 190 (1872) ; *Aga Mahomed Jaffer Bindanim v. Koolsom Beebee*, I. L. R., 25 Cal., 9 P. C. ; L. R., 24 I. A., 196 (1897) ; *Mazhar Husen v. Bodha Bibi*, I. L. R., 21 All., 91 P. C. ; L. R., 25 I. A., 219 (1898).

Art. 466. Any person who is an adult and of sound mind can make a will. An adult person can make a will.

At the time the will is made, the legatee must be actually living or at least conceived, and the object bequeathed must be susceptible of being transferred after the testator's death.

Any bequest made by a lunatic is void. A bequest made by a minor is also void, whether it is unconditional or subject to his attaining his majority.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 119, 452, 457, 458 ;
Fatawa-i-Kazi Khan, Vol. 4, p. 422.

Baillie, Bk. 10, Chap. 1, p. 614 ; Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 1, p. 673 ; Zaidunil-Ambani, Vol. 2, p. 270.

Where a Mahomedan made a will and made a certain testamentary disposition in favour of the lawful son of his eldest son, not then born, held, that such son born after the testator's death was, according to Mahomedan law, incapable of taking any bequest under the will.

Scott, J., observed as follows :—

“The conditions of a valid bequest are that the testator is competent to make the transfer of the property, that the legatee is competent to receive it, and that the subject of the bequest is susceptible of being transferred. The second condition is obviously incapable of fulfilment by any one not in existence at the time of the testator's death ; and the only relaxation of the rule is the case of a child in the womb, if born within six months from the date of the bequest. In the Code of Mahomedan law according to the Hanefite Rite, prepared by a Council of Pundits (Ulamas) from the University Mosque of El Azhar at Cairo ten years ago, and which is now in use in Egypt, this rule is thus expressed :—“*Pour faire un testament il faut être libre, majeur, sain d'esprit et jouissant de son libre arbitre. Il faut en outre que le légataire soit réellement vivant ou au moins conçu et la chose léguée susceptible d'être transférée après la mort du testateur*”

(Droit Mussulman, s. 531)—*Abdul Cadur Haji Mahomed v. C. A. Turner*, 1. L. R., 9 Bom., 158 (1884).

When
bequests of
a prodigal
are valid.

Art. 467. The bequests of a prodigal are only valid, when they are made in favour of the poor, or of pious or charitable institutions.

Notes.

Hidaya, Vol. 3, p. 241.

Zaidu-nil-Ambani, Vol. 2, p. 273.

What
property can
be bequeath-
ed.

Art. 468. Movable or immovable property can be bequeathed, as well as the use or produce of such property for a definite period or in perpetuity.

Notes.

Bahrr ul-Rayek, Vol. 8, p. 459.

Zaidu-nil-Ambani, Vol. 2, p. 274.

Where a Mahomedan by his will gave certain shares in his property to his widow and other heirs and directed that his son should continue in possession 'always' and 'for ever' and thereby restricted alienation by such heirs, held, that the right of an heir to her share in the property was clear upon the terms of the instrument and that she was entitled to recover possession of the same—*Muhammad Abdul Majid v. Fatima Bibi*, 1. L. R., 8 All., 39, P. C. ; L. R., 12 I.A., 159 (1885).

Where the
whole of
testator's
property
may be
bequeathed
to a single
person.

Art. 469. A person without heirs and not in debt to the full amount of his estate, can bequeath the whole or part of his property to any person he chooses.

Notes.

Radd-ud-Muhtâr, Vol. 5, p. 452 ; Fatawa-i-Alam-giri, Vol. 7, p. 64.

Baillie, Bk. 10, Chap. 1, p. 615 ; Zaidu-nil-Ambani, Vol 2, p. 274.

Where an instrument contained the words : "the ownership of the property to be in me whilst I am alive", held, that it was a

bequest by the testatrix of the whole of her property which was invalid according to Mahomedan law—*Shek Muhammad v. Shek Imamuddin*, 2 Bom. H. C. R., 50, *per* Couch, C. J. (1865).

A Mahomedan lady made a will disinheriting her nearest relations and leaving her entire property to her nephew "*naslan bud naslan batnan bad batnan*", held, that the devise to the nephew, under Mahomedan law, was absolutely to him, and that the words quoted simply gave him full power over the estate, and did not extend the devise to his sons in case of his death before the testator—*Oomuttoonnissa v. Areefoonnissa*, 4 W. R., 66 (1865).

According to Mahomedan law a testatrix is entitled to make a devise of her whole property—*Mahomed Altaf Ali v. Ahmed Buksh*, 25 W. R., 121 (1876).

Art. 470. Bequests made by a person in debt to the full amount of his estate are only valid, when the creditors release the testator or consent to the legacies.

When a bequest made by a person in debt to the full amount of his estate is valid.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 452.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 1, p. 673 :
Zaidu-nil-Ambani, Vol. 2, p. 275.

A *wasiatnamah* or will, diverting all the property belonging to the testator from his next heirs, is invalid under Mahomedan law—*S. Jumeenooddeen Ahmed v. M. Hossein Ali*, 2 W. R., 49 (1865).

Art. 471. A bequest in favour of an heir is only valid when assented to after the testator's death, by the other heirs capable of disposing of their rights.

When a bequest in favour of an heir is valid.

In determining whether a person is an heir or not, regard is to be had to the time of the testator's death, and not to the time the bequest is made.

The assent once given by an heir who is not a legatee is irrevocable, and he can be compelled to deliver up the legacy he has assented to.

Where some of the heirs, who are not legatees, assent, such assent will take effect with regard to

them only and proportionately to their shares in the estate.

Notes.

Fatawa Sirajiah, Vol. 4, p. 423 ; Fatawa-i-Alamgiri, Vol. 7, p. 64.

Zaidunil-Ambani, Vol. 2, p. 276.

A will made in favour of one heir, cannot take effect without the consent of the other heirs according to Mahomedan law—*Syed Lutf Ali v. Syed Rahut Ali*, 6 Sel. Rep., S. D. A. 190 (1837).

A Mahomedan cannot make a bequest of more than a moiety of his estate in favour of his daughter—*Mahomed Mudun v. Khodezunissa*, 2 W. R., 181 (1865).

According to Mahomedan law a will which never received the requisite assent from the heirs of the testator, is inoperative to alter the right of possession of the heirs—*Qadir Ali Khan v. Nowsha Begum*, 2 N. W. P., H. C. R., 154 (1867).

In order to render a will valid under Mahomedan law, the assent of the heirs must be given after the death of the testator, because any assent given to the will before his death is no assent at all—*Nusrut Ali v. Zeinunnissa*, 15 W. R., 146 (1871).

Where a person can bequeath one-third of his property to a stranger.

Art. 472. When a person is competent to dispose of his property by will, he can bequeath one-third of it to a stranger. The validity of the bequest does not in this case depend upon the assent of the heirs.

A bequest exceeding one-third of the property is only valid upon the assent, after the testator's death, of the heirs capable of disposing of their rights. Assent given by the heirs during the testator's lifetime is void.

Notes.

Fatawa-i-Alamgiri, Vol. 7, p. 64 ; Radd-ul-Muhtâr, Vol. 5, p. 453.

Baillie, Bk. 10, Chap. 1, pp. 614, 615 ; Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 1, p. 672 ; Zaidunil-Ambani, Vol. 2, p. 276.

It is a well-known principle of Mahomedan law, that bequests to persons, not being legal, are restricted to a third of the

testator's estate—*Soobhancee v. Bhetun*, 1 Sel. Rep., S. D. A., 464 (1811).

A Mussalman may freely, by his will, give his property to strangers ; but to his relations in blood he has no occasion to bequeath anything, for they, the relations, are to have their respective shares according to Mahomedan law, as it is mentioned there. And if a man disposed of his property to his heirs and relations, to one more and to another less, or if the testator omit any of his relations, and after his death the heirs and relations agree to the bequests made, the will remains valid ; otherwise the will is only valid for the bequests made to the strangers, and invalid for the heirs and relations of blood, who are to receive their respective shares according to Mahomedan law—*Keramatul v. Nissan Bibee*, 2 Morley, 120 (1817).

Where a Mahomedan bequeaths less than one-third of his property to a person, such bequest is valid under Mahomedan law—*Nawab Amin-ood-Dowlah v. Syud Roshun Ali Khan*, 5 M. I. A., 199 (1851).

Under Mahomedan law a testatrix can dispose of only one-third of her property and the remaining two-thirds must pass to her heirs. Where the executor obtains probate of a will under the Probate and Administration Act (V of 1881), he is a mere trustee in respect of the two-thirds of the estate for the heirs of the testatrix—*Nawab Akbari Begum v. Nuzhat-ud-dowla*, 1 Cal. L. J., 594 ; 9 Cal. W. N., 938, P. C. (1905).

Where a Mahomedan testator after making certain provisions for his widow and daughters divided his property between his sons and imposed certain conditions and limitations, and where the will was assented to by the heirs of the testator after his death, held, that according to the ordinary rules of Mahomedan law the gift was good as an absolute gift and the conditions and limitations were void. Life-estates and contingent interests are not recognized by Mahomedan law—*Abdul Karim Khan v. Abdul Qayum Khan*, I. L. R., 28 All., 343 (1906).

The Hedaya lays down that, as in the case of most other nations, the Mahomedans have to a certain limited extent permitted the disposition of property by will. The author shows that,

prima facie, such a testamentary disposition is more opposed to legal principle even than a gift to vest in future, because at the time of vesting, the property has actually passed from the donor. He, however, on the whole vindicates this limited testamentary power, because it is desirable that men should be enabled, when warned by the approach of death, to supply their deficiencies. It is then declared, that one-third of the estate is the utmost which can be diverted at the pleasure of the testator from the legal heirs, and for this a precept of the Prophet himself is quoted. His words do not encourage testamentary disposition but permit it to the extent of a third.

The commentator then considers how the consent of heirs can validate a testamentary disposition of property in excess of one-third, and the doctrine is: "Their consent indeed during the life-time of the testator is not regarded, for this is an assent previous to the establishment of their right; they are therefore at liberty to annul it on the death of the testator. It is otherwise where the consent is given after the event, for as this is an assent subsequent to the establishment of their right, they are not afterward at liberty to annul it." This doctrine is unquestionably a logical consequence of the impossibility of giving that which one has not and of the invalidity of a gift to take effect in future. Further, the alienation of one-third to a portion of the heirs will not be legal without the assent of the other heirs subsequently to the death of the testator, because their benefits already sufficiently secured by the law are not within the reason of the rule on which testamentary disposition is established, and such a bequest would, as the certain occasion of family dissension, be opposed to public policy—*Cherachom Vittil v. Valia Pudiakel*, 2 Mad. H. C. R., 350 (1865).

See *Aesha v. Aesha*, 1 Borr. S. D. A., Bom., 339 (1818); *Gangbai v. Tavar Mullah*, 1 Bom., H. C. R., 71 (1863); *Ekin Bebee v. M. Ashruf Ali*, 1 W. R., 152 (1864); *Bahoo Jan v. M. Noorool Huq*, 10 W. R., 375 (1868); *Sukoomut Bibee v. S. Warris Ali*, 22 W. R., 400 (1874); *Fatima Bibee v. Ariff Ismailjee Bham*, 9 C. L. R., 66 (1881).

Husband
and wife can

Art. 473 Provided there is no other heir, husband and wife can make bequests to each other. Should

there be another heir the bequest is subject to the latter's consent. bequeath to each other.

Notes.

Fatawa-i-Alamgiri, Vol. 7, p. 64 ; Tahtavi, Vol. 4, pp. 317, 318.

Zaidu-nil-Ambani, Vol. 2, p. 281.

A Mussalman cannot make a bequest in favour of some of his heirs to the exclusion of others without their consent.—1 Mad. S. D. A., Dec., p. 254 (1820).

A Mahomedan testator cannot, under Mahomedan law, give preference to one heir over another—*Hidayat Ali v. Tajan*, 5 Sel. Rep., S. D. A., 335 (1833).

The rule of Mahomedan law is that a legacy cannot be left to one of the heirs without the consent of the rest—*Ahedoonissa v. Ameeroonissa*, 9 W. R., 257 (1868).

Art. 474. A bequest made in favour of a person directly responsible for the homicide or even accidental death of the testator is void, unless the heirs assent to the bequest, or the author of the crime is a minor, lunatic or the testator's sole heir. Where a bequest made in favour of a person who caused the death of testator is void.

A person who has been the indirect cause of the testator's death does not lose the benefit of a bequest made in his favour.

Notes.

Fatawa-i-Alamgiri, Vol. 7, p. 64 ; Tahtavi, Vol. 4, pp. 317, 318.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 1, p. 672 ; Zaidu-nil-Ambani, Vol. 2, p. 282.

Art. 475. A bequest made in favour of a child in its mother's womb is valid, provided it is born alive either within six months from the date of the bequest if the father is alive, or within two years from the date of the mother's separation existing at the date of the Where bequest made in favour of a child in the womb is valid.

bequest, and caused either by the father's death or a perfect or imperfect irrevocable repudiation.¹

If the mother bears twins and both are living, each takes one-half of the legacy. Should one of the twins die after birth, its share is divided among its heirs, and if one of them die before birth, the whole legacy falls to the survivor.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 455 ; Fatawa-i-Alam-giri, Vol. 7, p. 65.

Hamilton's Hedayah, Vol. 4, Bk. 42, Chap. 1, p. 674 ; Zaidunil-Ambani, Vol. 2, p. 284.

See *Abdul Cadur Haji Mahomed v. C. A. Turner*, I. L. R., 9 Bom. 158, *per* Scott, J. (1884).

Art. 476. Bequests made in favour of mosques, charitable institutions, hospitals and schools (*madrasahs*) are valid. Such bequests are employed in building such institutions, in relieving the poor who frequent them, and for their maintenance and other necessary expenditure, according to custom and to the testator's wish.

Bequests can also be made for works of public utility generally. Such bequests are employed in carrying out such acts as are beneficial to the community as a whole. This would include the building of bridges, the making of roadways, the construction of mosques, assisting needy theological students, and any other works that are useful and beneficial to the public and do not tend to the benefit of private individuals.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 463 ; Fatawa-i-Alam-giri, Vol. 7, p. 68.

Zaidunil-Ambani, Vol. 2, p. 286.

Charitable
bequests
are valid.

¹ See Art 239.

Art. 477. Difference of religion or of nationality presents no obstacle to the validity of a bequest. A Muslim can bequeath to a non-Muslim, and a legacy is also valid which is made by a non-Muslim, in favour of a Muslim.

Difference of religion does not render a bequest invalid.

Notes.

Tahtavi, Vol. 4, p. 317 ; Hidayah, Vol. 4, pp. 641, 674 ; Radd-ul-Muhtâr, Vol. 5, p. 285.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 1, p. 671 ; Zaidun-nil-Ambani, Vol. 2, p. 287.

See Sale's Koran, Chap. LX, p. 447.

Art. 478. A bequest only takes effect after formal or tacit acceptance subsequent to the testator's death. Acceptance during the testator's lifetime is null and void. A legatee becomes the owner of the property bequeathed by his mere acceptance of the same after the testator's death, and independently of taking possession.

A bequest must be accepted subsequent to the testator's death.

Where the legatee neither accepts nor refuses the legacy, the property bequeathed remains in abeyance. It does not become the property of the heirs of the legatee, until the latter has either signified his acceptance or refusal, or until he dies, but if the legatee dies after the testator, without expressing his intention, the legacy devolves upon his heirs.

Notes.

Fatawa-i-Alamgiri, Vol. 7, p. 64 ; Tahtavi, Vol. 4, p. 318 ; Radd-ul-Muhtâr, Vol. 5, p. 458 ; Hidayah, Vol. 4, p. 642.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 1, p. 673 ; Zaidun-nil-Ambani, Vol. 2, p. 288.

Circumstances connected with the revocation of a bequest.

Art. 479. A testator can revoke a bequest either expressly or by any act to the object of the bequest occasioning a change in its name, and substantially modifying its nature and the use to which it was destined.

Where there is an increase to a bequest of such a nature that the property bequeathed cannot be disposed of without the increase, or where the object of the bequest is subsequently disposed of by the testator, the bequest is thereby revoked.

Revocation also takes place where the testator joins the object of a bequest to some other property from which it cannot be separated or can only be separated with difficulty.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 458, 459.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 1, pp. 674, 675 ;
Zaidu-nil-Ambani, Vol. 2, p. 290.

Denial of a bequest does not constitute revocation.

Art. 480. Denial of a bequest does not constitute its revocation, any more than the plastering or demolition of a house which has been bequeathed constitutes revocation.

Notes.

Tahtavi, Vol. 4, pp. 318, 319.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 1, p. 675 ;
Zaidu-nil-Ambani, Vol. 2, p. 291.

Testator is not responsible for the loss of object of bequest while in his possession.

Art. 481. A testator is not responsible for the loss of the object of a bequest while it is in his possession.

Where the object bequeathed is lost while in the possession of one of the heirs, the latter is not responsible for such loss, provided it is accidental. Loss occasioned to the object bequeathed by the testator's

use thereof is equivalent to revocation. The heirs on the contrary are responsible for any loss resulting from their use, whether the loss happens before or after acceptance.

Notes.

Zaidu-nil-Ambani, Vol. 2, p. 292.

SECTION II.—RIGHTS OF THE LEGATEE.

(Arts. 482—487.)

Art. 482. A testator, leaving heirs him surviving can only validly dispose of one-third of his property by way of bequest. Should he make a bequest in excess of one-third and should the heirs not assent, the legatee is only entitled to a third of the testator's whole property, provided the latter made the bequest while in good health.

A testator having heirs can only dispose of one-third of his property by way of bequest

Notes.

Hedaya. Vol. 4, p. 674 ; Radd-ul-Muhtâr, Vol. 5, pp. 453, 465.

Zaidu-nil-Ambani, Vol. 2, p. 293.

A Mahomedan can alienate only one-third of his property by will, and the other two-thirds must pass to his heirs—*Ruzia Begum v. Aka Moolahmud Ibrahim*, 1 Sel. Rep., S. D. A., 199 (1806).

Under Mahomedan law, the consent of heirs, in respect of a bequest to a stranger, need not be express, but it may be signified by conduct showing a fixed and unequivocal intention—*Doulattram v. Abdul Kayum*, I. L. R., 26 Bom., 497 (1902).

Art. 483. Where a testator has bequeathed to two different persons two legacies, equal in amount, which together exceed one-third of his property and the heirs do not assent to the two dispositions, the two legatees are entitled to equal shares in one-third of the estate.

Where two equal legacies are bequeathed which together exceed one-third of the estate.

Where there are two legacies of unequal amount and one exceeds a third of the estate, this third part

is still to be divided equally between the two legatees each taking half.

Notes.

Hedaya, Vol. 4, p. 646 ; Tahtavi, Vol. 4, pp. 322, 323.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 1, p. 676 ;
Zaidu-nil-Ambani, Vol. 2, p. 293.

Where
testator be-
queaths an
unspecified
share sub-
ject to vari-
ation.

Art. 484. Where a testator bequeaths an unspecified share, the amount of which is subject to variation, the heirs are at liberty to allow the legatees such portion as they please. If the testator has no heir, the legatee is entitled to one-half of the estate and the other half falls to the *bait-ul-mal*.¹

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 465, 466.

Zaidu-nil-Ambani, Vol. 2, p. 301.

Where one-
third of
property is
bequeathed
to two
persons one
of whom was
dead at the
time the be-
quest was
made.

Art. 485. Where a testator has bequeathed one-third of his property to two specified persons capable of inheriting, and at the time the bequest was made, one of them was dead or was proved to be missing, the third part so bequeathed will devolve in full upon the legatee who is living and present.

Where one of two legatees dies before the testator his share lapses and the other legatee shall only be entitled to one-half of the third of the estate, and where the testator states that he bequeathes a third of his property to two persons, whom he names, and one of them is found to have been dead at the time of the bequest, the survivor is only entitled to one-sixth.

¹ Or the public treasury.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 465, 466, 469.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 2, p. 679 ; Zaidunil-Ambani, Vol. 2, p. 302.

Art. 486. Where a testator bequeaths a definite object or something specified and essentially divisible, as for example, the third of his money in specie, or of his flock of sheep, or of his garments all of the same quality, and if two-thirds of the object of which the bequest forms part perish, the legatee is entitled to the full remaining third, so long as it is less than one-third of the total property left by the testator.

Where testator bequeaths a thing definite and specified and two-thirds of the object forming the bequest perish.

Should the testator bequeath something not essentially divisible, such as one-third of his cattle or one-third of his garments which are of different kinds, and should two-thirds of the object of which the legacy forms a part perish, the legatee is only entitled to a third of the remaining third which has not perished.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 465, 468.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 22, p. 679 ; Zaidunil-Ambani Vol. 2, p. 303.

Art. 487. Where a testator bequeaths a specified sum of money and his estate consists in specie and money due, the legacy is to be paid out of a third of the available specie, provided that this third is larger than or equal to the legacy. Where the legacy exceeds a third of the specie available, the legatee takes this third and as the money-debt is recovered, he takes one-third of each sum recovered until the legacy is fully paid.

Where testator bequeaths a specified sum and there is a debt against the estate.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 465, 468, 469.

Zaidu-nil-Ambani, Vol. 2, p. 306.

SECTION III.—BEQUESTS OF USE AND PRODUCE OF
PROPERTY FOR A LIMITED PERIOD.

(Arts. 488—493.)

Where
testator
bequeaths
right of
residence in
or the rents
of house.

Art. 488. Where a testator bequeaths the right of residence in or the rents of his house for life or without specifying any period, the legatee during his lifetime is entitled to reside in or to let and receive the rents of the house. On the death of the legatee however the property becomes the absolute property of the testator's heirs.

If the bequest for use or produce is for a fixed period, the legatee is entitled to enjoy the bequest until the said fixed period has expired, and if the testator has bequeathed the usufruct of property for a number of years not specified, the enjoyment of the legacy shall not exceed three years.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 481, 482 ; Hedayah, Vol. 4, p. 668.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 5, p. 692 ; Zaidu-nil-Ambani, Vol. 2, p. 307.

Where
testator
bequeaths
use or pro-
duce of
immovable
property not
exceeding
one-third of
his estate.

Art. 489. Where a testator bequeaths the use or the produce of immovable property which does not exceed the third of his estate, the legatee is entitled to be placed in possession of such property and to enjoy it in accordance with the conditions of the bequest. Where the immovable property bequeathed constitutes the testator's entire estate and the use or produce is divisible, such immovable property shall be divided into

three equal parts and the legatee shall be entitled to one-third, and the heirs to two-thirds without power to dispose of them so long as the legatee's right exists.

Where the immovable property bequeathed does not constitute the testator's entire estate though it exceeds one-third thereof, the said immovable property is to be divided in such a manner as will provide the legatee with a third of the use or produce of the whole estate.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 482; Hedaya, Vol. 4, p. 668.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 5, pp. 692, 693; Zaidunil-Ambani, Vol. 2, p. 308.

Art. 490. Where use, such as a right of residence, is bequeathed, the legatee cannot let the house. Where produce, such as rents, are bequeathed, the legatee is not entitled to the right of residence.

Right of legatee in bequests of use and produce of property.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 482.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 5, pp. 692, 693; Zaidunil-Ambani, Vol. 2, p. 311.

Art. 491. Where the produce of a certain piece of land is bequeathed, the legatee is entitled to the crops standing at the time of the testator's decease, and to the crops which such land shall bear subsequently whether the legacy was given for life or without any period being specified.

Legatee's right to standing crops.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 483, 484.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 5, p. 695; Zaidunil-Ambani, Vol. 2, p. 312.

Legatee's right when produce of land is bequeathed without mention of any period.

Art. 492. Where a testator bequeaths the produce of his land or garden without specifying any period, the legatee shall only be entitled to the crops standing at the time of the testator's death and not to subsequent crops.

If the testator bequeaths such produce for life, the legatee shall not only be entitled to the crops standing at the time of the testator's death, but also to those which may be grown thereafter. If the property bequeathed bears no fruit at the time of the testator's death, the rule still holds good as to subsequent crops.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 483, 484.

Zaidu-nil-Ambani, Vol. 2, p. 312.

Usufruct of property may be bequeathed to one person and the property itself to another.

Art. 493. The testator may bequeath the usufruct of property to one person and the property itself to another. If the land bears produce, tithes, land tax, expenditure on irrigation and other expenses necessary for the improvement of the land, must be borne by the usufructuary; but if the land is not bearing produce, these outlays and taxes must be borne by the legatee to whom the property itself has been bequeathed.

Notes.

Tahtavi, Vol. 4, pp. 334, 335.

Zaidu-nil-Ambani, Vol. 2, p. 313.

SECTION IV.—DEATH-BED GIFTS AND TRANSACTIONS BY THE SICK.

(Arts. 494—505.)

Unconditional gift is valid to the extent of whole pro-

Art. 494. An unconditional gift made by a person enjoying good health is valid to the extent of the whole of his property.

Notes.

Tahtavi, Vol. 4, p. 328.

perty if
made in
good health.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 2, p. 684 ;
Zaidu-nil-Ambani, vol. 2, p. 314.

Art. 495. Bequests are valid to the extent of a third of the estate, even though bequeathed while the testator is not in good health.

When be-
quests are
valid only to
the extent
of a third of
the estate.

Notes.

Tahtavi, Vol. 4, p. 328.

Zaidu-nil-Ambani, Vol. 2, p. 317.

See *Ashadoola v. Shaiba Jhasor*, 2 Hay, 345 (1863) ; *Ekin Beebee v. Ashraf Ali*, 1 W. R., 152 (1864) ; *Ashruffunissa v. Azeemun*, 1 W. R., 17 (1864) ; *Kureemun v. Mullick Enaet Hossein*, W. R. Sup. Vol., 221 (1864) ; 6 N.-W. P., H. C. R., 154 (1874) ; *Gulam Mustapha v. Hurmat*, I. L. R., 2 All., 854 (1880) ; *Wazir Jan v. Altaf Ali*, I. L. R., 9 All., 357 (1887) ; *Sharifa Bebi v. Gulam Mahomed*, I. L. R., 16 Mad., 43 (1892) ; *Aga Mahomed Jaffer Bindanim v. Koolson*, I. L. R., 25 Cal., 9, P. C. ; L. R., 24 I. A., 219 (1897) ; *Hassarat Bibi v. Golam Jaffar*, 3 C. W. N., 57 (1898).

Art. 496. Transactions of a gratuitous nature by a person during his last illness are valid as bequests only to the extent of a third of his property.

Where trans-
actions of a
gratuitous
nature are
valid.

Notes.

Tahtavi, Vol. 4, p. 328.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 2, p. 684 ;
Zaidu-nil-Ambani, Vol. 2, p. 318.

Art. 497. A gift made by a cripple, a paralytic or a consumptive person is valid in respect of the whole of his property, provided the malady has continued for one year without endangering his life : if his life is in danger the disposition is only valid to the extent of a third of his property.

Where gifts
made by
cripples,
paralytics
and con-
sumptives
are valid

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 373 ; Fatawa-i-Alam-giri, Vol. 7, p. 77 ; Hedaya, Vol. 4, p. 637.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 2, p. 685 ; Zaidunil-Ambani, Vol. 2, p. 314.

See *Labbi Beebee v. Bibhun Beebee*, 6 N. W. P., H. C. R. 159 (1874) ; *Muhammad Gulshere Khan v. Mariam Begum*, I. L. R., 3 All., 731 (1881) ; *Hassarat Bibi v. Golam Jaffer*, 3 C. W. N., 57 (1898) ; *Fatima Bibee v. Ahmad Baksh*, I. L. R., 31 Cal., 319, per Rampini, J. (1903).

Where a person in last illness acknowledges a debt in favour of another who is not his heir.

Art. 498. Where a person during his last illness acknowledges a debt in favour of another who is not his heir, such acknowledgment is valid in its entirety, even when the debt exceeds the whole value of the property.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 507.

Hamilton's Hedayah, Vol. 3, Bk. 25, Chap. 3, p. 438 ; Zaidunil-Ambani, Vol. 2, p. 327.

Where a sick person acknowledges a debt in favour of an heir.

Art. 499. Where a sick person acknowledges a debt in favour of an heir, such acknowledgment is void unless assented to by the other heirs. On the other hand where he acknowledges having used a deposit entrusted to him by an heir, such acknowledgment is valid.

Notes.

Radd-ul-Muhtâr, Vol. 4, pp. 509, 510.

Hamilton's Hedayah, Vol. 3, Bk. 25, Chap. 3, p. 437 ; Zaidunil-Ambani, Vol. 2, p. 327.

How the status of heir is to be determined.

Art. 500. The status of heir must exist at the time the acknowledgment is made, whether such status arises from consanguinity, or any other cause existing at the time of the acknowledgment.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 510 ; Vol. 5, p. 454.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 2, p. 684 ; Zaidunil-Ambani, Vol. 2, p. 333.

Art. 501. Where a man in his last illness acknowledges a debt, or makes a bequest in favour of a wife, whom during the same illness he has irrevocably repudiated at her own request, she is only entitled to whichever be the lower in amount of the acknowledged debt and legacy, or of the share of the estate which would devolve upon her as an unrepudiated wife.

Where a man in his last illness acknowledges a debt made in favour of a wife whom in that illness he had irrevocably repudiated.

Where repudiation did not take place at the wife's request, she shall have the whole of her share in the estate, however large it may be, provided her husband dies during her *Iddat*.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 571 ; Vol. 4, p. 511.

Hamilton's Hedayah, Vol. 3, Bk. 25, Chap. 3, p. 438 ; Zaidunil-Ambani, Vol. 2, p. 335.

Art. 502. Where a man is in debt to the full extent of his estate, and during his last illness remits a debt in favour of a debtor, such release is void. A release made in favour of a debtor who is also an heir is always void, whether the sick person is in debt or not.

Release of a debt in last illness is void if testator is in debt himself to the full extent of his estate.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 508.

Hamilton's Hedayah, Vol. 3, Bk. 25, Chap. 3, p. 437 ; Zaidunil-Ambani, Vol. 2, p. 336.

Art. 503. Where a wife during her last illness remits a debt in favour of her husband, such release is only valid when assented to by her other heirs.

Where wife in last illness remits a debt.

Notes.

Zaidu-nil-Ambani, Vol. 2, p. 336.

Debt takes precedence over a legacy and a legacy over a share in the inheritance.

Art. 504. A debt takes precedence over a legacy, and a legacy is payable before a share in the inheritance. A debt acknowledged by a person while in good health, or a debt established by proof, takes precedence over a debt acknowledged during the last illness, even though the latter debt be for a deposit.

Notes.

Tahtavi, Vol. 4, pp. 367, 368, 369; Radd-ul-Muhtâr, Vol. 4, p. 507.

Hamilton's Hedayah, Vol. 3, Bk. 25, Chap. 3, pp. 436, 437; Zaidu-nil-Ambani, Vol. 2, p. 339.

See *Hamir Singh v. Zakia*, I. L. R., 1 All., 57, F. B. (1875); *Syed Bazuyat Hossein v. Dooli Chand*, L. R., 5 I. A., 211; I. L. R., 4 Cal., 402, P. C. (1878); *Land Mortgage Bank v. Bidoyadhari Dasi*, 7 C. L. R., 460 (1880); *Land Mortgage Bank v. Roy Luchmiput Singh*, 8 C. L. R., 447 (1881); *Pirthi Pal Singh v. Hussaini Jan*, I. L. R., 4 All., 361 (1882); *M. Awais v. Har Sahai*, I. L. R., 7 All., 716 (1885); *Jafri Begam, v. Amir Muhammad*, I. L. R., 7 All., 822, F. B. (1885); *Bussunteram v. Kamaluddin Ahmed*, I. L. R., 11 Cal., 421 (1885); *Amba Shankar v. Sayad Ali Rasul*, I. L. R., 19 Bom., 273 (1894); *Amir Dulhin v. Baij Nath Singh*, I. L. R., 21 Cal., 311 (1894).

Debts which cannot validly be paid during last illness.

Art. 505. A person during his last illness cannot validly pay even a portion of debts, referred to in the foregoing Article, if there are other debts which take precedence over them. Creditors whose debts were before the last contracted illness are on the same footing with the wife to whom dower is due, and the creditors to whom rent is due.

Notes.

Radd-ul-Muhtâr, Vol. 4, pp. 507, 508.

Hamilton's Hedayah, Vol. 3, Bk. 25, Ch. 3, p. 437 ; Zaidunil-Ambani, Vol. 2, p. 343.

CHAPTER III.

THE EXECUTOR: HIS POWERS AND DUTIES.

(Arts. 506—552.)

SECTION I.—THE EXECUTOR.

(Arts. 506—520.)

Art. 506. A person who has accepted the office of executor during the testator's life-time cannot after the testator's death refuse to fulfil the duties of executor, unless the testator had given him the power to renounce the executorship at any moment.

Where a person accepts executorship during testator's life-time.

Notes.

Bahrr-ul-Rayek, Vol. 8, p. 521 ; Radd-ul-Muhtâr, Vol. 5, p. 487.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 7, p. 697 ; Zaidunil-Ambani, Vol. 2, p. 135.

By Section 3 of the Probate and Administration Act (V of 1881) "Executor" means a person to whom the execution of the will last of a deceased person is, by the testator's appointment, confided.

See also Section 4 of the Probate and Administration Act (V of 1881) ; In the goods of *Hossein Ali*, 1 Fulton, 339 (1843) ; *Mohammad Alif v. Chandaree Petro*, 5 Sev. S. D. A., 119 (1858).

Art. 507. A refusal to become executor, made during the life-time and with the knowledge of the testator, is valid, but if the refusal was not made known to the testator, it is not valid.

Refusal to become executor.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 487.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 7, p. 697 ; Zaidunil-Ambani, Vol. 2, p. 136.

Where after refusal office cannot be accepted.

Art. 508. A person who has declined to become executor during the life-time and with the knowledge of the testator, cannot accept such office after the testator's decease.

Notes.

Tahtavi, Vol. 4, p. 337.

Zaidunil-Ambani, Vol. 2, p. 136.

Where executor before testator's death neither accepts nor refuses.

Art. 509. An executor who before the testator's death has not expressed his intention of refusing or accepting, can do so after the testator's decease, and can then accept the office even if he has previously declined it.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 487.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 7, p. 697 ; Zaidunil-Ambani, Vol. 2, p. 137.

Tacit acceptance equivalent to express acceptance.

Art. 510. Tacit acceptance of executorship is equivalent to an express acceptance. Such tacit acceptance results from any act of administration on the part of the executor, such as the sale of anything belonging to the testator's estate, the purchase, on behalf of the heirs, of anything useful to them, or the payment or recovery of debts due to, or by the estate.

Notes.

Bahrr-ul-Rayek, Vol. 8, p. 522.

Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 7, p. 697 ; Zaidunil-Ambani, Vol. 2, p. 138.

Art. 511. A testator cannot appoint an executor and restrict him to the accomplishment of certain specified acts. Where such a restriction is made the executorship is regarded as a general one. Thus, if the deceased has appointed one person to discharge his debts and another to recover them both become general executors.

Testator cannot restrict executor to certain specified acts.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 487.

Baillie, Bk. 10, Chap. 8, p. 671 ; Zaidunil-Ambani, Vol. 2, p. 139.

Art. 512. A testator can appoint as executor his wife, the mother of a minor child, any other woman, or any one of his heirs. The mother or any other person can be appointed to watch over the acts of the executor acting as guardian of the children's property.

Persons who may be appointed as executors.

Notes.

Zaidunil-Ambani, Vol. 2, p. 141.

Art. 513. An executor appointed by the father takes precedence over the paternal grandfather. If the father appoints as executor of his son's property the latter's mother, and persists in this wish until his death, the paternal grandfather cannot claim the right to administer the son's property. On the other hand if the father dies intestate, the paternal grandfather, if a man of prudence and capable of fulfilling the duties of executor, takes precedence over the mother.

Executor appointed by father takes precedence over paternal grand father.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 497.

Hamilton's Hedayah, Vol. 4, Bk. 52, Ch. 7, p. 702 ; Zaidunil-Ambani, Vol. 2, p. 141.

Qualifications necessary for an executor.

Art. 514. An executor should be a Muslim, of sound mind, adult, trustworthy and a man of prudence. Where a testator has appointed as executor any person not possessing these qualifications, the judge may remove him and appoint another in his place.

Notes.

Bahrr-ul-Rayek, Vol. 8, p. 523.

Baillie, Bk. 10, Chap. 8, pp. 667-659 ; Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 7, p. 698 ; Zaidu-nil-Ambani, Vol. 2, p. 142 ; Clavel, Vol. 1, pp. 340, 341, 346.

See Sale's Koran, Chap. IV, p. 77.

Where a Mahomedan appointed a Hindu as executor, held, that though the appointment of other than a Muslim as executor to the will of the Muslim is lawful, yet it was incumbent upon the Kazi to remove him from his office ; the reason why the appointment, though not perfectly correct, is said to be legal, is because his official acts, as executor, are valid according to Mahomedan law—*M. Ameenooddeen v. M. Kubeeroodeen*, 4 Sel. Rep., S. D. A., 63 (1825).

Although the appointment by a Mahomedan of a person of another religion to be his executor is valid, yet it is incumbent on the ruling power to take the trust out of his hands and appoint another. Where, therefore, a Mahomedan appointed a Christian as his executor to his last will and testament, held, such appointment was lawful—*Henry Imlach v. Zuhooroonisa Khanum*, 4 Sel. Rep., S. D. A., 382 (1828).

The appointment of an infidel executor does not invalidate the will, and further, all the acts of such an executor, and his dealing with the property under the will, until he is removed by the Civil Court, are good and valid according to Mahomedan law—*Jehan Khan v. C. K. Mandy*, 10 W. R., 185, per Phear, J. (1868).

Testator can always revoke executorship.

Art. 515. A testator, even without the executor's knowledge, may revoke the executorship which the latter has accepted.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 487.

Zaidu-nil-Ambani, Vol. 2, p. 143.

Art. 516. So long as he is trustworthy and capable of discharging his duties, an executor appointed by the testator cannot be removed by the judge. If he is not able to discharge such duties, the judge will appoint a co-executor. But where the judge considers an executor incompetent to fulfil the duties of his office, he can appoint another in his place. Should he subsequently become competent, the judge can reinstate him in his position as executor.

Executor so long as he is trustworthy cannot be removed.

The executor cannot be removed on a mere complaint made by one or several of the heirs. He can only be removed when he has been proved guilty of a breach of trust.

Notes.

Fath-ul-Kadir, Vol. 4, p. 300 ; Hedaya, Vol. 4, p. 677 ; Radd-ul-Muhtâr, Vol. 5, p. 488.

Baillie, Bk. 10, Chap. 8, p. 669 ; Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 7, p. 698 ; Zaidunil-Ambani, Vol. 2, 144 ; Clavel, Vol. 1, pp. 341, 346.

Art. 517. Where a man dies without having appointed an executor and leaving no heirs, the judge will appoint an executor, in the event of there being debts owing by the estate or assets to be realized, or to carry out the last wishes, if any, of the testator.

Where a man dies appointing no executor and leaving no heirs the judge will appoint an executor.

The judge may also appoint an executor, if one of the heirs is a minor, if the minor's father is notoriously extravagant, if there is occasion to establish a right in the interests of a minor whose guardian is away in a distant country, or if the heirs persist in refusing to sell the property of the estate in order to pay the debts.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 497 ; Hamidiah, Vol. 2, p. 317 ; Fatawa-i-Khairiah, Vol. 2, p. 218.

Zaidunil-Ambani, Vol. 2, p. 146 ; Clavel, Vol. 1, p. 364.

Cases in which joint executors can act independently of each other.

Art. 518. Where the deceased, or even the judge, has appointed two executors, neither of them can validly act independently of the other, except in the following cases :—

The burial of the deceased : the bringing of legal actions in the deceased's name to protect his rights : the claiming of debts due to the deceased : the payment of debts due by the deceased : the carrying out of the last wish of the deceased in favour of some poor person : the purchase of necessities for the minor's use : the acceptance of a gift in the minor's favour : the setting of the minor to some occupation : the lending or leasing of the minor's property : the repayment of loans of specified property deposited with the deceased : the restitution of goods wrongly acquired by the deceased and of goods bought by him under a defective sale : the division with any co-owner of the deceased, of things which may be replaced by others of a like nature : the sale of any object likely to deteriorate : and the recovery of scattered property.

Whether the testator authorized his executors to act separately or conjointly, his intention must in either case be carried out.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 489, 491.

Baillie, Bk. 10, Chap. 8, pp. 669, 670 ; Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 7, pp. 698, 699 ; Zaidunil-Ambani, Vol. 2, p. 148 ; Clavel, Vol. 1, p. 345.

Where two executors are appointed and only one accepts.

Art. 519. Where two executors are appointed by the testator and after the latter's death, one only accepts the executorship, the judge may appoint some other person to act jointly with him.

Where such a person is appointed, the executor takes precedence when it is a question of protecting the property of the testator, but the executor cannot dispose of any property without such person's co-operation and advice.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 487, 491.

Baillie, Bk. 10, Chap. 8, p. 671 ; Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 7, p. 700 ; Zaidu-nil-Ambani, Vol. 2, p. 154.

Art. 520. Where the deceased has appointed an executor who in his turn has appointed an executor, the latter becomes executor for both estates, even when his appointment is only in respect of the executor's estate. So also where the judge appoints an executor who, in his turn, appoints an executor, the latter, if the executorship is general, becomes executor for both estates.

Where deceased appoints executor who in his turn appoints an executor.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 491, 492 ; Durrul-Mukhtâr, Vol. 5, p. 503.

Baillie, Bk. 10, Chap. 8, pp. 672, 673 ; Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 7, p. 700 ; Zaidu-nil-Ambani, Vol. 2, p. 156.

According to Mahomedan law, an executor is competent, on the approach of his death, to appoint a successor for the same purpose—*S. Hafeez-oor-Rahman v. Khadim Hossein*, 4 N. W. P., H. C. R., 106 (1871).

SECTION II.—POWERS AND DUTIES OF EXECUTORS.

(Arts. 521—552.)

Art. 521. When the heirs are all minors and the estate is free from all debts and legacies, the executor has the power to dispose of the movable property

Cases where the executor can dispose of a minor's property.

even at a slight loss, and whether or not the heirs are in immediate need of money.

The executor can only dispose of the minor's immovable property for one of the following reasons :—

1. When such immovable property can be sold at double its value.

2. When there is a debt against the estate which can only be liquidated by the sale of the immovable property, in which case the executor is empowered to sell only such portion of the immovable property as will satisfy such debt.

3. When the deceased has not indicated how legacies are to be paid and there is no sufficient movable property to meet such legacies, in which case only such portion of the immovable property as will satisfy the legacies may be sold.

4. When the minor's requirements demand the sale of immovable property, it may then be disposed of at its actual value or even at a slight loss.

5. When the up-keep of, and taxes on, the immovable property exceed its revenue.

6. When immovable property such as a house or shop is in danger of falling down.

7. When the immovable property is liable to incur any loss through the influence of a powerful man.

Trees, palms and sheds, but not the ground they stand on, are held to be movable property.

Any sale of immovable property by an executor except for one of the above-mentioned legal reasons is void, and cannot be ratified by the minor on attaining his majority.

Notes.

Bahrr-ul-Rayek, Vol. 8, p. 533 ; Hamidiah, Vol. 2, p. 322 ; Radd-ul-Muhtâr, Vol 5 , pp. 494, 495 ; Fatawa-i-Khariah, Vol. 2, pp. 217, 218.

Baillie, Bk. 10, Chap. 8, pp. 673, 674, 676, 677 ; Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 7, p. 702 ; Zaidunil-Ambani, Vol. 2, p. 157 ; Clavel, Vol. 1, p. 349.

Section 3 of the Probate and Administration Act (V of 1881) defines minor as follows :—"Minor" means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed his age of eighteen years, and "minority" means the status of any such person.

Section 3 of the Bengal Court of Wards Act (II of 1879) defines minor as follows :—"Minor" means a person who has not completed his age of twenty-one years.

See Chapters VI, VII and XIII of the Probate and Administration Act (V of 1881).

By Mahomedan law an executor may properly sell portions of the estate of a deceased Mahomedan, if such sale be necessary for the purpose of paying debts or legacies, or otherwise in the course of a due administration of the estate—*Shah Enaet Hossein v. Syud Rumzan*, 10 W. R., 216 (1868).

The powers of the executor or administrator of a Cutchi Memon are generally limited to recovering debts, and securing debtors paying the same, and the same rule would seem to apply to the executor or administrator of a Khoja Mahomedan—*Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*, I. L. R., 6 Bom., 703 (1882) ; See also In the matter of *Haji Ismail*, I. L. R., 6 Bom., 452 (1880).

Art. 522. When the estate is free from all debts and legacies and the heirs are all adult and are present, the executor cannot dispose of any property without their consent.

Where the consent of the heirs is necessary before the executor can

dispose of
any of the
property.

He can however recover debts and validly receive any thing else which may be due. If the heirs are all adult and absent, the executor can only dispose of the movable property, and take charge of the proceeds.

When all the heirs are adult and some are present and others absent, the executor can only dispose of that portion of the movable property which falls to the share of those who are absent. He can only dispose of their shares in the immovable property for the payment of debts.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 494.

Zaidu-nil-Ambani, vol. 2, p. 163.

Where the
executor can
dispose of
the movable
and immov-
able prop-
erty of the
heirs.

Art. 523. Where there is no debt or legacy payable out of the estate, and some of the heirs are minors and some adult, the executor can dispose of the movable and immovable property falling to the share of the minors, provided that it is for any of the reasons specified in Art. 521. He cannot dispose of the shares devolving upon the heirs who are adult, unless they are absent; in which case he can only dispose of their shares in the movable property.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 494.

Baillie, Bk. 10, Chap. 8, p. 675 ; Zaidu-nil-Ambani, Vol. 2, p. 164.

Procedure
when the
estate is
encumbered.

Art. 524. When the estate is charged with debts and legacies and there is no money in cash, it is not incumbent on the heirs to pay such debts and legacies from their own funds, if the estate of the deceased is wholly absorbed by such debts. The executor, appointed by the father, can dispose of all the movable and immovable property of the estate.

Where there is no money in cash to pay the debts and legacies, and the debts do not absorb the entire estate, the executor, even without the consent of the heirs, can dispose of so much of the property as will suffice to pay such debts and legacies.

In providing for the payment of debts or of legacies, the executor must first dispose of the movable property : should the sum thus realized be insufficient, he can then dispose of such portion only of the immovable property as will satisfy the debts and legacies.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 494.

Zaidu-nil-Ambani, Vol. 2, p. 165.

Art. 525. A paternal grandfather or the executor he appoints, cannot dispose of any property of the estate, movable or immovable, to pay the deceased's debts or legacies. Either of them, however, can dispose of the said property to pay the debts due by the minor heirs.

Paternal grandfather cannot sell any property to pay the debts or legacies of the deceased without sanction of the judge.

The creditors or legatees of deceased must apply to the judge, who will order such part of the property to be sold as will satisfy their claims.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 497, 504, 505.

Zaidu-nil-Ambani, Vol. 2, p. 166.

See Section 90 of the Probate and Administration Act (V of 1881).

Art. 526. An executor appointed by a mother, cannot dispose of any property movable, or immovable, except such property as is inherited from the mother. He cannot even dispose of property inherited by the minor from the mother when there is in existence a

Power of the executor appointed by a mother.

father or a paternal grandfather, or an executor appointed by either of them. On the other hand the executor, appointed by the mother, can dispose of her estate, if the minor has no father or paternal grandfather living, and no executor has been appointed by them.

When the mother has left no debts or legacies, her executors can only dispose of such portion of the movable property as is sufficient to purchase necessities for the wards. When the mother has left debts or legacies her executor can sell both the movable and immovable property to satisfy such debts or legacies.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 495, 497.

Baillie, Bk. 10, Chap. 8, pp. 675, 678 ; Zaidunil-Ambani, Vol. 2, p. 167 ; Clavel, Vol. 1, p. 352.

Powers of the executor as regards the application of minor's property.

Art. 527. An executor can apply the property of a minor in trade, on behalf of and for the benefit of the minor, and with a view to increasing the latter's estate. He can do any thing that tends to the minor's welfare and interest, but he cannot, on his own account, trade with the property of the minor.

Notes.

Fatawa-i-Khairiah, Vol. 2, p. 337.

Baillie, Bk. 10, Chap. 8, pp. 680, 681; Hamilton's Hedayah, Vol. 4, Bk. 52, Chap. 7, p. 702 ; Zaidunil-Ambani, Vol. 2, p. 169.

Powers of the executor as regards the sale of minor's property.

Art. 528. An executor, even at a slight loss, can sell the movable property of a minor to a person who is a stranger to the executor and to the deceased, and, on the minor's behalf he can buy any property from such a person. He can sell nothing to an heir of the deceased, unless the sale be greatly to the advantage of the minor.

Notes.

Fatawa-i-Khairiah, Vol. 2, pp. 323, 324 ; Radd-ul-Muhtâr, Vol. 5, pp. 493, 502.

Zaidu-nil-Ambani, Vol. 2, p. 170.

Art. 529. An executor can sell a minor's property and allow a reasonable time for payment, provided that the buyer is solvent, and not likely unduly to delay the payment or deny the debt when it becomes due.

Where executor can allow a reasonable time for payment.

Notes.

Fatawa-i-Alamgiri, Vol. 7, p. 103.

Zaidu-nil-Ambani, Vol. 2, p. 173.

Art. 530. An executor appointed by the father, can sell his own property to the minor, and can himself buy the latter's property, provided that the transaction is greatly to the advantage of the minor.

Where executor can sell his own property to minor and buy minor's property.

Where the executor buys immovable property from the minor, the price paid must be double its value and if he sells to the minor, it must be half its value.

Where the executor buys movable property from the minor, the price paid must be one and a half times its value and if he sells, it must not be more than two-thirds of its value.

An executor appointed by the judge, can never buy property belonging to the minor or sell to the minor property of his own.

Notes.

Durrul-Mukhtâr, Vol. 5, p. 493 ; Radd-ul-Muhtâr, Vol. 5, p. 493.

Zaidu-nil-Ambani, Vol. 2, p. 172.

Powers of the executor as regards giving or lending minor's property.

Art. 531. An executor cannot pay his own debts out of the minor's property, nor can he borrow or lend property of the minor. He cannot pledge his own goods in the minor's interest, nor can he give the minor's goods by way of security for his own debts. He can, however, pledge the minor's property in order to secure a debt of the minor. He can also accept a security in respect of a debt due to the minor or to the deceased.

Notes.

Fatawa-i-Alamgiri, Vol. 7, p. 104 ; Tankihul Hamidiah, Vol. 2, p. 329 ; Radd-ul-Muhtâr, Vol. 5, p. 348 ; Bahrr-ul-Rayek, Vol. 8, p. 534.

Zaidu-nil-Ambani, Vol. 2, p. 173 ; Clavel, Vol. 1, p. 354.

Executor cannot delegate his powers to another person.

Art. 532. An executor can delegate to another person all his powers of administration of the minor's property. Such delegation terminates on the death of the executor or of the minor.

Notes.

Fatawa-i-Khairiah, Vol. 2, p. 219.

Zaidu-nil-Ambani, Vol. 2, p. 178.

Executor cannot release a debtor from a debt due to the estate.

Art. 533. An executor cannot release any debtor from a debt due to the deceased, nor can he remit part of a debt due to the latter, nor grant any extension of time to a debtor. But if the debt was contracted by himself, he can either, on his own responsibility, remit the debt in part, or grant an extension of time or even release the debtor altogether.

Notes.

Fatawa-i-Alamgiri, Vol. 7, p. 105.

Zaidu-nil-Ambani, Vol. 2, p. 178.

Art. 534. An executor can compound a debt due to the deceased or to the minor, provided the debt cannot be proved or is not supported by witnesses and is denied by the debtor. If the existence of the debt is supported by trustworthy witnesses or if it is acknowledged by the debtor or judicially decreed, the executor cannot compound it. On the other hand, if the minor owes a debt which is not disputed or which is recognized by the judge, the executor must pay such debt in full.

Circumstances in which an executor can compound a debt due to the estate.

Notes.

Fatawa-i-Alamgiri, Vol. 7, p. 105.

Zaidu-nil-Ambani, Vol. 2, p. 180.

Art. 535. An admission on the part of the executor of liability in respect of a debt or legacy, is void.

Executor's admission of a debt is void.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 496.

Zaidu-nil-Ambani, Vol. 2, p. 180.

Art. 536. An acknowledgment by an heir of a debt due by the deceased, is only binding on such heir and he must contribute towards its payment in proportion to his share in the estate of the deceased. Thus, should an heir acknowledge a legacy amounting to a third of the estate, he must contribute a third part of his share in the estate towards the payment of such legacy.

Where an heir's acknowledgment of a debt due by the deceased is binding.

Notes.

Radd-ul-Muhtâr, Vol. 4, p. 501.

Zaidu-nil-Ambani, Vol. 2, p. 183.

Art. 537. An executor must provide a reasonable scale of maintenance for his ward, neither stinting him nor being too lavish with him. Should the minor's

Executor must provide reasonable maintenance for his ward.

maintenance as fixed by the judge, be insufficient, the executor has the power to add to it.

Notes.

Radd-ul-Muhtar, Vol. 5, p. 500.

Zaidu-nil-Ambani, Vol. 2, p. 185.

See Sale's Koran, Chap. XVII, p. 229, and Chap. XXVI, p. 301.

Where executor from his own funds advances ward's maintenance.

Art. 538 An executor who out of his own funds has paid for the maintenance of a minor who is without means, or who possesses property which cannot be utilized, cannot claim to be indemnified for such advances, unless at the time of making such payment he had declared before witnesses that he did so with a view to their recovery. In such a case the executor can claim to be reimbursed by the minor, unless he comes within the list of relations who can be made liable for the poor minor's maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 727, 728 ; Vol. 5, pp. 498, 505.

Zaidu-nil-Ambani, Vol. 2, p. 185.

Responsibility of executor for paying debt due by the deceased's estate.

Art. 539. Where an executor pays a debt against the deceased's estate and the debt has been proved by the claimant, or been admitted by the heirs, the executor is alone responsible for such payment, unless he can himself furnish sufficient proof of such debt, in which case he will not be responsible.

Notes.

Fatawa-i-Alamgiri, Vol. 7, p. 105 ; Radd-ul-Muhtâr, Vol. 5, p. 496.

Zaidu-nil-Ambani, Vol. 2, p. 187.

Art. 540. When an executor is without means, he can claim the salary usually paid in such cases, otherwise no salary is due. Executor without means can claim salary

Notes.

Fatawa Sirajiah, pp. 435, 436 ; Fatawa-i-Kazi Khan, Vol. 4, p. 439.

Zaidu-nil-Ambani, Vol. 2, p. 189 ; Clavel, Vol. 1, p. 356.

Art. 541. On attaining his majority, a minor can demand from the executor an account of his administration. The minor must pay the costs of such account. Minor on reaching majority can demand from the executor an account of the latter's administration.

Where an executor refuses to furnish an account of his administration, the judge may order him to do so, but shall not imprison him.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 500, 501.

Zaidu-nil-Ambani, Vol. 2, p. 189.

Art. 542. Where an executor dies without specifying the property of his ward, the executor's estate is not responsible. Where the executor has specified the property, the ward upon coming of age, is entitled to claim such property, if it exists, or its value from the executor's estate if the property has disappeared. Minor's claim against deceased executor's estate.

Notes.

Hamalvi, p. 469.

Zaidu-nil-Ambani, Vol. 2, p. 194 ; Clavel, Vol. 1, p. 360.

Art. 543. An executor's sworn declaration holds good in respect of all acts which fall within the scope of his duties as executor, unless the contrary be proved. Where the executor's sworn declaration as to his acts is sufficient.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 501.

Zaidu-nil-Ambani, Vol. 2, p. 189.

Where it is not sufficient,

Art. 544. With regard to acts which are outside his powers and duties, the executor's sworn declaration by itself, will not hold good : the burden of proof falls on him.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 501.

Zaidu-nil-Ambani, Vol. 2, p. 191.

Executor's false statements must be rejected.

Art. 545. Where an executor's statements are shown to be false they must be rejected.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 501.

Zaidu-nil-Ambani, Vol. 2, p. 189 ; Clavel, Vol. 1, p. 360.

Where executor's declaration as to expenditure may or may not be accepted.

Art. 546. An executor's declaration shall be accepted with regard to any reasonable expenditure he has made on behalf of the minor or the deceased, except among others, in the following cases :—

If he claims to have paid without an order from the judge a debt for which the deceased was liable or to have paid the same out of his own funds ; if he claims that during his minority, the minor has made use of the property of another, and that the executor has compensated the owner from his own funds or from those of his ward ; if he claims that he has provided maintenance for some specified person with whom the minor is prohibited from contracting marriage ; if he claims to have paid the minor's land-tax during the bad season for agriculture, if he claims to have paid debts contracted by a minor authorized to engage in trade ; if he claims to have paid dower out of his own funds to a woman to whom he married his ward and who is dead ; or if he claims a share of the profits realized through his trading with the minor's funds under a claim of alleged partnership (*muzaribhat*).

In all these cases, if the minor upon attaining his majority, dispute the executor's statement, he cannot be made liable, unless the executor substantiates his claim by the evidence of trustworthy witnesses.

Notes.

Tahtavi, Vol. 4, p. 345 ; Radd-ul-Muhtâr, Vol. 5, pp. 500, 501.

Zaidu-nil-Ambani, Vol. 2, p. 191 ; Clavel, Vol. 1, p. 360.

See Sections 146, 147 of the Probate and Administration Act (V of 1881).

Art. 547. When a minor ward of either sex, attains his or her majority, the executor must not deliver possession of the property, unless he is satisfied that the ward is able to administer the estate properly.

Executor cannot deliver property to ward unless satisfied of the latter's ability to administer it properly.

Notes.

Tahtavi, Vol. 4, p. 85.

Zaidu-nil-Ambani, Vol. 2, p. 195.

Art. 548. Where a minor attains his majority and is in full possession of his faculties, he becomes responsible for his actions. Neither his father nor the executor can interfere with the administration of his own property, unless the judge has declared him incapable of administering it.

Where minor upon attaining majority cannot be interfered with in the administration of his property.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 104, 105.

Zaidu-nil-Ambani, Vol. 2, p. 195.

See Sale's Koran, Chap. IV, p. 60.

Art. 549. Where a minor upon attaining his majority shows any tendency towards extravagance, his property is not to be delivered to him until he has reached the age of twenty-five years, unless, before reaching that age, he gives proof of ability to administer and dispose of his property in a right and reasonable manner.

Property is not to be delivered to a minor who upon attaining majority shows signs of extravagance.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 102, 103.

Zaidu-nil-Ambani, Vol. 2, p. 196.

Executor becomes responsible for property delivered to minor who is unfit to administer.

Art. 550. Where an executor delivers property to a minor on attaining his majority, and the minor is unfit to administer such property, the executor, if aware of his ward's unfitness, is responsible for the property he has handed over.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 102.

Zaidu-nil-Ambani, Vol. 2, p. 196.

Executor not responsible for delivering property to a minor who shows capacity for good management.

Art. 551. Where an executor delivers property to a minor who has not yet attained his majority but who shows capacity for good management, the executor is not responsible for any loss that occurs to the property after handing it over to the minor.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 102.

Zaidu-nil-Ambani, Vol. 2, p. 198.

Disputes on minor's attaining majority and fitness for management.

Art. 552. Where a minor upon attaining his majority claims to be fit to manage his own affairs, and the executor disputes such fitness, the latter cannot be compelled to deliver the minor's property, until the minor has been declared by the judge to be capable of such management.

If the executor refuses to deliver the property to the minor after the latter has been declared competent by the judge to administer his own property, and after the minor has duly called upon the executor to

make such delivery, the latter will be held responsible for any loss occasioned to the property while it is in his hands.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 102, 103.

Zaidu-nil-Ambani, Vol. 2, p. 198.

See Chapter XIII of the Probate and Administration Act (V of 1881).

CHAPTER IV.

INHIBITION (HAJR), LEGAL INCAPACITY, THE AGE OF REASON,
AND MAJORITY.

(Arts. 553—570.)

SECTION I.—INHIBITION (HAJR), LEGAL INCAPACITY.

(Arts. 553—564.)

Art. 553. The minor, the lunatic, the prodigal, and the bankrupt are legally incapable.

Persons who are legally incapable.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 97, 98, 101.

Zaidu-nil-Ambani, Vol. 2, p. 199.

Hajr, in its primitive sense, means interdiction or prevention. In the language of the law it signifies an interdiction of action, with respect to a particular person, who is either an infant, an idiot or a slave; the cause of inhibition being three, infancy, insanity and servitude—Hamilton's Hedayah, Vol. 3, Bk. 35, p. 524.

Art. 554. The acts of a minor who has not reached the age of reason, or of a lunatic who has no lucid intervals, are null and void, and those of a lunatic in his lucid intervals, are valid.

Where the acts of a minor and of a lunatic are valid.

Notes.

Bahrr-ul-Rayek, Vol. 8, pp. 88, 89.

Hamilton's *Hedayah*, Vol. 3, Bk. 35, p. 524 ; *Zaidu-nil-Ambani*, Vol. 2, p. 200 ; *Clavel*, Vol. 1, p. 367.

See Sections 11, 12 of the Indian Contract Act (IX of 1872).

Such acts if prejudicial to the minor or lunatic are void even if approved by guardian.

Art. 555. The acts of a minor who has reached the age of reason, or of an adult who is insane, are radically void if they are prejudicial to their interests even though such acts were approved by the guardian.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 99, 119 ; *Tahtavi*, Vol. 4, p. 97.

Zaidu-nil Ambani, Vol. 2, p. 201.

Mahomedan law looks to the benefit of the minor and permits the guardian to dispose of movable property, if it be for the benefit of the minors—*Syedun v. Velayet Ali*, 17 W. R., 239 (1872).

See *Kali Dutt Jha v. Abdul Ali*, 1. L. R., 16 Cal., 627, P. C. ; L. R., 16 I. A., 96 (1888).

Such acts if profitable to the minor or lunatic are valid even if not approved by guardian.

Art. 556. The acts of the minor who has reached the age of reason, or of the lunatic, are valid, so long as they are clearly profitable to them, even though such acts were not approved by the guardian.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 99, 119 ; *Tahtavi*, Vol. 4, p. 97.

Zaidu-nil-Ambani, Vol. 2, p. 201.

Where the acts of a lunatic or of a minor are valid when ratified by guardian.

Art. 557. The acts of a minor who has reached the age of reason, or of an adult who is insane, and which may turn out either profitable or prejudicial are valid, provided they were capable of ratification and were ratified by the guardian.

Where the guardian has not ratified the act, or where it was an act which ratification could not render valid, the transaction is null and void.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 99, 119; Tahtavi, Vol. 4, p. 97.

Zaidu-nil-Ambani, Vol. 2, p. 201.

See Section 198 of the Indian Contract Act (IX of 1872).

Art. 558. A minor is only civilly responsible for offences against persons or property, and is personally liable for damages. An adult lunatic is in the same position as the minor.

Minor and lunatic are responsible for offences against persons or property.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 99; Bahrr-ul-Rayek, Vol. 8, p. 89.

Hamilton's Hedayah, Vol. 3, Bk. 30, Chap. 1, p. 525; Zaidu-nil-Ambani, Vol. 2, p. 202.

See Section 11 of the Indian Contract Act (IX of 1872).

Art. 559. A minor, as well as an adult lunatic, is not responsible for money borrowed, nor for any deposit entrusted to him, nor for any loan made to him, nor for anything sold to him, if such transactions are entered into without the guardian's sanction. He is, however, responsible for the value of any deposit that is entrusted to him with the guardian's sanction.

Cases where the minor is not responsible for transactions entered into without the guardian's sanction.

Notes.

Bahrr-ul-Rayek, Vol. 8, p. 89; Tahtavi, Vol. 4, pp. 82, 83.

Zaidu-nil-Ambani, Vol. 2, p. 203.

See *Nawab Syud Asadoolla Khan v. Sumarchund Dutt*, Dec. S. D. A. Ben. 595 (1848).

A prodigal is to be declared incompetent by the judge.

Art. 560. Where an adult is proved to be a prodigal by the testimony of witnesses, he will be declared legally incapable by the judge. A prodigal cannot demand the avoidance of any act on the ground that it was performed in jest. He is in the same position as a minor with regard to his civil acts.

While his inhibition lasts, the prodigal's acts are only valid when authorized by the judge. All his acts entered into previous to his inhibition are valid and must produce their effects.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 101, 102 ; Tahtavi, Vol. 4, pp. 84, 85.

Zaidu-nil-Ambani, Vol. 2, p. 210.

Acts which cannot be repudiated by a prodigal.

Art. 561. The acts of a prodigal cannot be rendered void on the ground that they were performed in jest.

Thus, the prodigal can contract marriage, pronounce a valid repudiation, and furnish maintenance to those persons to whom it is due. He is not subject to paternal authority. He can validly make a declaration admitting a personal debt. He can validly confess to the perpetration of an offence involving a retaliating or a pecuniary penalty. He can make any charitable gift or legacy up to the third of his estate if he has an heir.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 101, 102 ; Tahtavi, Vol. 4, pp. 84, 85.

Hamilton's Hedayah, Vol. 3, Bk. 35, Chap. 2, pp. 526, 528, 529 ; Zaidu-nil-Ambani, Vol. 2, p. 215 ; Clavel, Vol. 1, p. 368.

Art. 562. A law-giver (*mufti*) who intentionally leads people astray or gives bad advice, the incompetent doctor, the bankrupt, the builder, and any person who holds the monopoly of any industry, must be prohibited from following their occupations.

Persons who mislead people should be prohibited from following their occupations.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 101.

Zaidu-nil-Ambani, Vol. 2, p. 217 ; Clavel, Vol. 1, p. 374.

Art. 563. Where a guardian is satisfied that his ward understands that a sale transfers property, and that a purchase results in its acquisition, and that he can distinguish between a slight and a heavy loss, he can authorize such ward to engage in trade.

Where a guardian can authorize a minor to engage in trade.

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 102, 103, 119, 120.

Zaidu-nil-Ambani, Vol. 2, p. 203.

Art. 564. A minor authorized to trade can buy and sell, even at a heavy loss : he can appoint an agent to buy or sell : he can give and take property by way of security : in his own interests he can consent to a contract for hire : he can take or let farm lands on lease : he can make a valid declaration admitting a debt on deposit : he can remit a portion of the purchase-price for a latent defect in the contract : he can allow grace to a debtor : and he can compound a debt with any one.

Transactions that a minor authorized to trade may undertake.

The minor who is authorized to trade cannot lend otherwise than on hire, cannot make a gift or become security for any one, nor can he contract marriage without his guardian's consent. The authorization to trade given by the guardian to his ward does not

interfere with the guardian's power to dispose of the ward's property,

Notes.

Radd-ul-Muhtâr, Vol. 5, pp. 108, 109, 110, 111, 112, 113.

Zaidunil-Ambani, Vol. 2, p. 203 ; Clavel, Vol. 1, p. 363.

SECTION II.—THE AGE OF REASON, ADOLESCENCE
AND MAJORITY.

(Art. 565—570.)

The age of
reason and of
adolescence.

Art. 565. The age of reason for a child of either sex is seven years at the least : at this age the right of custody ceases for a boy.

The age of adolescence for a boy is fixed at twelve years. The girl is adolescent at nine years, and the right of custody ceases for her at that age.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 694, 695 ; Vol. 5, p. 105 ; Fatawa-i-Alamgiri, Vol. 2, p. 166.

Zaidunil-Ambani, Vol. 2, p. 218.

See Sections 2 and 3 of the Indian Majority Act (IX of 1875). See also Notes to Article 391.

How the age
of puberty
is to be
determined.

Art. 566. The puberty of a boy is determined by the physical signs which denote that state. It is the same with the girl, regard being had to the physical signs peculiar to her sex. Failing such signs, minors of either sex are held to have reached the age of puberty on completing their fifteenth year.

Notes.

Radd-ul-Muhtâr, Vol. 5, p. 105.

Hamilton's Hedayah, Vol. 3, Bk. 25, Chap. 2, p. 529 ; Zaidunil-Ambani, Vol. 2, p. 225.

Art. 567. At the age of puberty guardianship ceases for both sexes. At this age also both are free to dispose of their persons. They cannot be compelled to marry unless they are insane. Nevertheless the guardianship as regards property does not necessarily cease at the age of puberty, but continues until the ward of either sex is considered fit to manage his or her own property.

At the age of puberty guardianship ceases.

Notes.

Radd-ul-Muhtâr, Vol. 2, p. 323 ; Vol. 5, p. 103 ;
Fatawa-i-Alamgiri, Vol. 2, p. 12.

Zaidu-nil-Ambani, Vol. 2, p. 226.

See Section 7 of the Guardian and Wards Act (VIII of 1890).

Art. 568. A minor of either sex cannot, before puberty, choose between his or her father and mother.

Before puberty minor cannot choose between father and mother.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 695, 696.

Zaidu-nil-Ambani, Vol. 2, p. 227.

Art. 569. A boy, who on reaching puberty, is capable of being left to his own discretion, can choose between his father and mother, and can even elect to live separately.

But a boy may do so at puberty.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 695, 696.

Zaidu-nil-Ambani, Vol. 2, p. 228.

Art. 570. A girl, who has reached puberty and is a virgin, or who, though not a virgin, cannot be trusted to her own discretion, must be placed under the guardianship of her father or paternal grandfather.

A girl has no option but must be placed under the guardianship of

father or
or paternal
grandfather.

A woman advanced in years, who is still a virgin, virtuous, and possesses good sense, cannot be compelled to live with her paternal guardian. The same rule will apply even if she is not a virgin if she can be trusted to her own discretion.

Notes.

Radd-ul-Muhtâr, Vol. 2, pp. 695, 696.

Zaidu-nil-Ambani, Vol. 2, p. 228.

CHAPTER V.

MISSING PERSONS.

(Arts. 571—581.)

Where a
person is
held to be
missing in
law.

Art. 571. A person is held to be missing in law when his whereabouts is unknown, and it is uncertain whether he is dead or alive.

Notes.

Radd-ul-Muhtâr, Vol. 3, p. 358.

Hamilton's Hedayah, Vol. 2, Bk. 13, p. 213 ; Baillie, Bk. 11, Chap. 6, p. 703 ; Zaidu-nil-Ambani, Vol. 2, p. 347 ; Clavel, Vol. 1, p. 371.

Where the
missing
person has
appointed
an agent.

Art. 572. Where a missing person has appointed an agent for the purpose of administering and preserving his property, the authority of such agent cannot be revoked by reason of the principal's absence.

The presumptive heirs of a missing person cannot withdraw his property from the hands of his agent or from the public treasury, even when he has no legal heirs.

An agent cannot carry out the necessary repairs of a missing person's property without the sanction of the judge.

Notes.

Radd-ul-Muhtâr, Vol. 3, p. 358.

Zaidu-nil-Ambani, Vol. 2, p. 347 ; Clavel, Vol. 1, p. 369.

Art. 573. Where a missing person has not appointed an agent, the judge shall appoint an administrator to collect his rents and debts acknowledged by his debtor and generally to administer his estate.

Where he has not done so.

Notes.

Radd-ul-Muhtâr, Vol. 3, p. 358.

Hamilton's Hedayah, Vol. 2, Bk. 12, p. 213 ; Zaidunil-Ambani, Vol. 2, p. 348.

Art. 574. A judge has the power to order the sale of the movable or immovable property belonging to a missing person, where such property is liable to deteriorate.

Where the judge has power to order the sale of his property when such property is liable to deteriorate.

He must take charge of the proceeds of the sale and restore them to the missing person on his return, or hand them over to his heirs, after his death has been judicially declared.

He cannot sell any property belonging to a missing person when such property is not likely to deteriorate, not even for the purpose of providing maintenance.

Notes.

Radd-ul-Muhtâr, Vol. 3, pp. 359, 361.

Hamilton's Hedayah, Vol. 2, Bk. 13, p. 214 ; Zaidunil-Ambani, Vol. 2, p. 349.

Art. 575. An administrator has power to provide maintenance for a missing person's relations, who are entitled to maintenance, out of the proceeds of property sold, or debts realized.

Administrator has power to provide maintenance for his relations.

Notes.

Radd-ul-Muhtâr, Vol. 3, p. 359.

Hamilton's Hedayah, Vol. 2, Bk. 13, p. 214 ; Zaidunil-Ambani, Vol. 2, p. 349.

A missing person is presumed to be alive in matters which affect him pre-judicially.

Art. 576. A missing person is presumed to be alive in regard to matters that affect him prejudicially, and are dependent on proof of his death. Thus, his wife cannot marry again, his heirs cannot divide his estate between them, the leases he has granted cannot be cancelled, nor can the judge dissolve his marriage before he has been proved to be dead.

Notes.

Radd-ul-Muhtâr, Vol. 3, pp. 358, 359.

Hamilton's Hedayah, Vol. 2, Bk 13, p. 216 ; Zaidunil-Ambani, Vol. 2, p. 350.

Where he is presumed to be non-existent in matters prejudicial to others.

Art. 577. In all matters that depend upon proof of a missing person's existence and which would benefit him or would be prejudicial to others, he is presumed to be non-existent or his existence is uncertain. Thus, he cannot receive his share in an inheritance or a legacy made in his favour, and until his existence or death has been judicially proved, the share or the legacy will be held in trust for him.

Notes.

Radd-ul-Muhtâr, Vol. 3, pp. 358, 360.

Hamilton's Hedayah, Vol. 2, Bk. 13, p. 261 ; Zaidunil-Ambani, Vol. 2, p. 350.

Where he is held to be dead where his contemporaries have all died.

Art. 578. A missing person is held to be dead when his contemporaries have all died ; if it is impossible to discover any of the latter, the judge shall declare him dead after the lapse of ninety years from his birth.

Notes.

Radd-ul-Muhtâr, Vol. 3, pp. 360, 361.

Hamilton's Hedayah, Vol. 2, Bk. 13, pp. 215, 216 ; Zaidunil-Ambani, Vol. 2, p. 352 ; Clavel, Vol. 2, p. 8.

See Section 108 of the Indian Evidence Act (I of 1872).

Where the son and daughter of an absent Mahomedan brought a suit in respect of his property, held, that until the ascertained death of such person, or such a lapse of time as would make his age amount to ninety years, the term of a legal existence, his heirs were not entitled to claim his property. But where a person was in possession of the estate of the lost or missing man, he cannot be deprived of it until the period had elapsed, and if he was making away with it, another person should be appointed for properly administering such estate—*Durvesh v. Shekun*, 2 Borr. S. D. A. Bom., 24 (1820).

The authorities of Mahomedan law vary as to the limit of time, when the death of any missing person may be adjudged. Abu Hanifa and Abu Yusuf say respectively, that the presumption arises, when 120 and 100 years have passed from the date of birth. According to Zahir Rawayet, the death of coevals, is the criterion; while other jurisconsults, on the principle of convenience, assume the ninetieth year from birth. On the expiration of the period, the death of the missing person will be judicially presumed and his heritage will become partible, amongst his heirs, living at the time—*Mani Bibi v. Sahebzadi*, 5 Sel. Rep. S. D. A., 129 (1831).

See *Dowlut Khatoon v. Khaja Alijan*, 2 Agra H. C. R., 59 (1867); *Kalee Khan v. Jadee*, 5 N. W. P., H. C. R., 62 (1873); *Hasan Ali v. Mahrban*, I. L. R., 12 All., 625, *per* Stuart, C. J. (1880).

The question whether a man be alive or dead is one simply of evidence and has no immediate connection with the devolution of property under Mahomedan law, and its determination should follow the rules of the Evidence Act (I of 1872)—*Parmesshar Rai v. Bisheshar Singh*, I. L. R., 1 All., 53 (1875).

On the question whether the rule of Mahomedan law, that a missing person is to be regarded as alive till the lapse of ninety years from his birth, is a rule of Mahomedan law of “succession, inheritance, marriage, or caste, or any religious usage or institutions” within the meaning of the Bengal Civil Courts Act (VI of 1871), Mahmood, J., among other things, observed as follows:—

“I must quote one more passage from the Fatawa-i-Alamgiri, which explains the rule of Mahomedan Law on the subject in brief terms, and with a precision not to be found in other works.

I am all the more anxious to cite this authority because the work, which is a monument of the industry of the Mahomedan lawyers, was prepared under the orders of the Emperor Aurangzeb, and was promulgated in India as the great Code of Mahomedan Law regulating the decision of disputes in India. The book possesses high authority, not only in this country, but under the name of *Tatawa-i-Hindi*, it is regarded in other Mahomedan countries, like Turkey, Egypt, and Arabia itself, as an authoritative work of Mahomedan Jurisprudence. This great work summarizes the state of Mahomedan law regarding missing persons in the following terms :—A missing person is declared dead on the lapse of ninety years, and this is the accepted opinion. And in the *Zahir-ur-Riwayat* the term is to be estimated by the death of his coevals, and therefore when none of them remains alive he is declared dead, and this is to be determined according to the death of his coevals in his town, as is said in the *Kafi*. The preferable (opinion) is that the question should be delegated to the opinion of the Imam, as is said in the *Tabeen*.

Now, regarding these texts carefully, there can, I think, be no doubt, *firstly*, that the rule of Mahomedan law as to missing persons has arisen from a maxim relating to the subject of evidence, and the rule of *istis-hab*, which is the outcome of that maxim, cannot be regarded as a rule of succession, inheritance, or marriage ; *secondly*, that among the great doctors of the Mahomedan law itself there is great difference of opinion as to the exact manner in which the rule of *istis-hab* is to be applied to missing persons ; *thirdly*, that as to the period necessary to elapse before the presumption of death can be applied to missing persons, Mahomedan jurists themselves are far from being unanimous ; *fourthly*, whilst some of the greatest doctors of the law would leave the fixation of period to the discretion of the judge in each individual case, others consider the preferable course to be that the matter should be determined by the Imam, that is, by the ruling authority, as distinguished from the Kazi or the Judge presiding in a judicial tribunal. These conclusions are amply borne out by the texts which I have quoted, and they convince me that the rule of Mahomedan law as to missing persons is a rule belonging purely to the domain of legal presumptions falling under the head of the law of evidence ; and, I may say, with due deference, that in my opinion the reported cases which have been

cited and which tend to support a contrary opinion are not based upon a sound view of Mahomedan law. It is true that, in some of the most celebrated treatises of that law, the rule has been discussed as if it were a part of the law of inheritance and succession ; but, on the other hand, the Hedaya itself and some other equally authoritative treatises have dealt with the subject in a perfectly separate chapter, obviously because the authors regarded it as too general to be classed under any particular head, applying, as it does, to all the branches of law in which the death of a missing person may happen to be the subject of investigation. I think that in administering a mediæval system of law it is supremely important that the Courts of Justice in British India should draw a clear distinction between the rules of substantive law and those which belong purely to the province of procedure, because, whilst under s. 24 of the Civil Courts Act the Courts are bound to administer the former branch of the law according to native laws in cases of succession, inheritance, and marriage, questions which go to the remedy, *ad litis ordinationem*, must be decided according to the general law of British India. The rule as to missing persons appears to my mind to be purely a rule of evidential presumption, and though before the passing of the Evidence Act there might have been perhaps some justification for the courts to apply the rule to cases of Mahomedan succession, inheritance, and marriage, the provisions of cl. (1), s. 2 of the Evidence Act leave no doubt in my mind that we are now bound, in connection with all questions of evidence, to administer the rules contained in that Act, and it follows that the present case is governed by s. 108 of the Statute."

.Petheram, C. J., observed as follows :—

"The question referred to the Full Bench in this case is— 'Does the rule contained in s. 108 of the Evidence Act govern the case of a Mahomedan who has been missing for more than seven years, in cases to which, under the provisions of s. 24 of the Civil Courts Act, the Mahomedan law is applicable?' The answer really depends on the question whether the mode in which the death of the missing person is to be proved, is part of the Mahomedan law of 'succession or inheritance.' By s. 24 of the Civil Courts Act, persons of the Mahomedan and the Hindu religions respectively are given the right of being

governed in the matters therein referred to by their own law, but any other question in which they are concerned are to be dealt with under the general law of the country. Now, questions of succession and inheritance are questions as to the manner in which property shall devolve or shall be distributed upon the death of the owner either with or without a will. I do not think that they are any thing more. Then comes s. 108 of the Evidence Act, which provides that 'when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.' Now, if a man's death has been properly proved, his estate will be divided according to the law of the community to which he belongs. But the first thing to be settled is the fact of his death, and only after that has been proved can questions of inheritance arise. The rule of Mahomedan law in regard to missing persons dates from ancient times and from social conditions to which it may well have been adapted. But to apply it to the totally different conditions of the present day, when the means of communication between distant places have been so extended and improved, and when no one can hide his existence from others in the manner which was formerly possible, and to presume that a man was living ninety years from the date of his birth, though his death was practically certain, would be a piece of gross injustice. It was to benefit the people of this country by enabling proof to be given of facts which should be known, that s. 108 of the Evidence Act was passed"—*Mazhar Ali v. Budh Singh*, I. L. R., 7 All., 297, F. B. (1884).

It is a well-known principle of Mahomedan law that if any children of a man die before the opening of the succession to his estate, leaving children behind, these grandchildren are entirely excluded from the inheritance by their uncles and aunts. Where, therefore, a Mahomedan claimed a share in his grandfather's estate, in right of his father, who was missing for many years, held that under the provisions of section 108 of the Indian Evidence Act (I of 1872), the burden was on him to establish that his father had survived his own father—*Moolla Cassim v. Molla Abdul Rahim*, I. L. R., 33 Cal., 173, P. C. ; 10 Cal. W. N., 33 (1905).

Art. 579. Where the death of a missing person has been declared by the judge, his property shall be divided among his heirs as they exist at the time of such declaration. Any share in the inheritance or any legacy to which the missing person is entitled, shall also be delivered to his heirs.

Procedure where missing person has been declared dead by judge.

His wife shall observe *Iddat*¹ of widowhood from the day on which he is judicially declared dead, and after such period of *Iddat* is completed, she shall be free to marry again.

Notes.

Fath-ul-Kadir, Vol. 2, p. 809; Radd-ul-Muhtâr, Vol. 3, pp. 361, 362.

Hamilton's Hedayah, Vol. 2, Bk. 13, p. 216; Zaidunil-Ambani, Vol. 2, p. 355.

Art. 580. If at any time a missing person is discovered to be in existence, or if he returns alive, he shall be entitled to his share in the inheritance of those of his relations who have died during his absence.

Where missing person is discovered to be in existence or returns.

Where he returns alive after his death has been declared by the judge, such of his property as is actually in possession of his heirs shall be restored to him, but he is not entitled to any property which they have disposed of or consumed.

Notes.

Radd-ul-Muhtâr, Vol. 3, p. 61.

Zaidunil-Ambani, Vol. 2, p. 356.

Art. 581. Where the wife, heirs or debtors of a missing person claim that he is dead and offer to furnish proof in support of such claim, the judge shall appoint

Procedure to be adopted where wife, heirs or debtors of a

¹ See Art. 310.

missing person claims that he is dead.

the absentee's agent or administrator, or failing either of the latter, a suitable person against whom the suit may be brought.

Notes.

Radd-ul-Muhtâr, Vol. 3, p. 361.

Zaidu-nil-Ambani, Vol. 2, p. 357.

APPENDIX.

BOOK I.

MARRIAGE.

الكتاب الأول في النكاح

CHAPTER I.

الباب الأول في مقدمات النكاح

ARTICLE 1.

(مادة ١) — وإما الخالية (عن نكاح وعدة) — فتخطب — [رد المحتار جلد ثاني كتاب النكاح صفحة ٦٧١]

Radd-ul-Muhtâr, Vol. 2, p. 671.

ARTICLE 2.

(مادة ٢) — والمعدة أي معدة كانت ... تحرم خطبتها ... وصح التعريض ...
لو معدة الوفاة لا المطلقة إجماعاً — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٧١ - ٦٧٢]
لا يجوز للرجل ان يتزوج زوجة غيره وكذلك المعددة — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٩]

Radd-ul-Muhtâr, Vol. 2, pp. 671, 672; Fatawa-i-Alamgiri, Vol. 2, p. 9.

ARTICLE 3.

(مادة ٣) — وينظر من الأجنبية ... إلى وجهها وكيفية فقط ... وكذا مريد نكاحها — [رد المحتار جلد خامس كتاب العطر والاباحة صفحة ٢٥٨]

Radd-ul-Muhtâr, Vol. 5, p. 258.

ARTICLE 4.

(مادة ٤) — وإنما يصح بلفظ تزويج ونكاح ... وما ... وضع لتمامك عين ...
في الحال — [رد المحتار جلد ثاني كتاب النكاح صفحة ٢٩٠]

(لكن) النكاح هو الايجاب و القبول مع ذلك الارتباط — [شرح الوقايع جلد ثاني
كتاب النكاح صفحة ٤]

Radd-ul-Muhtâr, Vol. 2, p. 290; Sharh-i-Vikaya, Vol. 2, p. 4.

CHAPTER II.

الباب الثاني في شرائط النكاح و أركانه واحكامه

ARTICLE 5.

(مادة ٥) — و ينعقد ... بايجاب من احدهما و قبول من الآخر —
[الدر المختار جلد ثاني كتاب النكاح صفحة ١]

Durrul-Mukhtâr, Vol. 2, p. 1.

كزوجت ... اشار الى عدم الفرق بين ان يكون الموجب اميلا او وليا او وكيلا
... وليس مراده استقصاء الالفاظ التي تصاح للإيجاب حتى يرد عليه ... انه كان عليه
ان يقول بعد قوله منك ... او من مولايتك او من موكلتك ليعم الاحتمالات ... و يقول
الآخر ... قبلت لنفسي او لموكلي او ابني او موكلتي — [رد المختار جلد ثاني كتاب
النكاح صفحة ٢٨٥]

Radd-ul-Muhtâr, Vol. 2, p. 285.

ARTICLE 6.

(مادة ٦) — و من شرائط الايجاب و القبول اتعاذ المجلس لو حاضرين و ان
طال ... و ان لا يخالف الايجاب القبول — [الدر المختار جلد ثاني كتاب النكاح
صفحة ٢]

فلو اوجب احدهما فقام الآخر او اشتغل بعمل آخر بطل الايجاب — [رد المختار
جلد ثاني كتاب النكاح صفحة ٢٨٨]

و شرط سماع كل من العاقدين لفظ الآخر — [الدر المختار جلد ثاني كتاب النكاح
صفحة ٢]

رجل تزوج امرأة بلفظة العربية او بلفظ لا يعرف معناه او زوجت المرأة نفسها
بذلك ان علم ان هذا لفظ ينعقد به النكاح يكون النكاح عذ الكل — [فتاوى قاضيهان
جلد اول كتاب النكاح صفحة ١٥٢]

*Durrul-Mukhtâr, Vol. 2, p. 2; Radd-ul-Muhtâr, Vol. 2, p. 288;
Fatawa-i-Kazi Khan, p. 152.*

ARTICLE 7.

(مادة ٧) — و شرط حضور شاهدين حرين او حر و حرتين مكلفين سامعين قولهما معاً... فاهدين انه نكاح ... مسلمين لنكاح مسلمة ولو فاسقين ... او اعميين او ابني الزوجين او ابني احدهما — [الدر المختار جلد ثاني كتاب النكاح صفحه ٢٠٨]
 فلا ينعقد بعصرة النائمين والاصميين — [رد المختار جلد ثاني كتاب النكاح صفحه ٢٩٥]
 النكاح لا ينعقد بشهادة ... السكران الذي لا يعقل — [فتاوى سراجيه في حاشية قاضيان باب انعقاد النكاح صفحه ٢٠٨]

Durrul-Mukhtár, Vol. 2, p. 2; Radd-ul-Muhtár, Vol. 2, p. 295; Fatawa-i-Sirajiah, p. 208.

ARTICLE 8.

(مادة ٨) — امر الاب رجلا ان يزوج صغيرته فزوجها عند رجل او امرأتين و الحال ان الاب حاضر صح ... ولو زوج بنته البالغة العاقلة بمحضر شاهد واحد جاز ان كانت ابنته حاضرة — [الدر المختار جلد ثاني كتاب النكاح صفحه ٢]

Durrul-Mukhtár, Vol. 2, p. 2.

ARTICLE 9.

(مادة ٩) — ولا بكتابة حاضر بل غائب بشرط اعلام الشهود بها في الكتاب — [الدر المختار جلد ثاني كتاب النكاح صفحه ١]
 وصورته ان يكتب اليها يخطبها فاذا بلغها الكتاب احضرت الشهود وقرأته عليهم وقالت زوجت نفسي منه او تقول ان فلانا كتب الي يخطبني فاشهدوا اني زوجت نفسي منه — [رد المختار جلد ثاني كتاب النكاح صفحه ٢٨٧]

Durrul-Mukhtár, Vol. 2, p. 1; Radd-ul-Muhtár, Vol. 2, p. 287.

ARTICLE 10.

(مادة ١٠) — ينعقد النكاح من الاخرس اذا كانت له اشارة معلومة — [رد المختار جلد ثاني كتاب النكاح صفحه ٢٩٤]

Radd-ul-Muhtár, Vol. 2, p. 294.

ARTICLE 11.

(مادة ١١) — وصح النكاح بلا ذكر مهر ومع نفيه ... وازم مهر مثلها ... عند وطئ او موت — [شرح الوقايه جلد ثاني كتاب النكاح صفحه ٣٣ - ٣٤]

Sharh-i-Vikaya, Vol. 2, p. 33-34.

ARTICLE 12.

(مادة ١٢) لو عقد مع شرط فاسد لم يبطل النكاح بل الشرط بخلاف ما لو علقه بالشرط — [الدر المختار جلد ثاني كذاب النكاح صفحة ٣]

Durrul-Mukhtár, Vol. 2, p. 4.

ARTICLE 13.

(مادة ١٣) — وبطل نكاح متعة و موقت — [الدر المختار جلد ثاني كتاب النكاح صفحة ٣]

Durrul-Mukhtár, Vol. 2, p. 4.

ARTICLE 14.

(مادة ١٤) — لو عقد بلفظ المتعة و اراد النكاح ... المؤبد فانه لا ينعقد و ان حضرة الشهود — [رد المختار جلد ثاني كتاب النكاح صفحة ٣١٨]
ولا يبرأ احدهما من صاحبه — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ١١]

Radd-ul-Muhtár, Vol. 2, p. 318; Fatawa-i-Alamgiri, Vol. 2, p. 11.

ARTICLE 15.

(مادة ١٥) نكاح الشغار وهو ان يعمل بضع كل من المراتين مهرا للآخرى ... يصح موجبا لمهر المثل لكل منهما — [رد المختار جلد ثاني كتاب النكاح صفحة ٣١٨]

Radd-ul-Muhtár, Vol. 2, p. 318.

ARTICLE 16.

(مادة ١٦) لا يثبت في النكاح خيار الروية والعيب و الشرط سواء جعل الخيار الزوج او المرأة — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٥]

فاذا شرط احدهما لصاحبه السلامة عن العمى والشلل والزمانة او شرط صفة الجمال او شرط الزوج عليها صفة البكارة فوجد بخلاف ذلك لا يثبت له الخيار — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٥]

ولا يتخير احدهما ... بعيب الآخر ... سوي العانة والعجب والغصاء — [جامع الرموز كتاب النكاح صفحة ٢٤٩]

Fatawa-i-Alamgiri, Vol. 2, p. 5; Jami-ur-Rumúz, p. 249.

ARTICLE 17.

(مادة ١٧) — النكاح ... عقد يفيد حكمه — من امرأة لم يمنع من نكاحها مانع شرعي — [رد المحتار جلد ثاني كتاب النكاح صفحہ ٢٧٩ - ٢٨٠]
 يجب مهر المثل فيما اذا لم يسم مهرأ [رد المحتار جلد ثاني كتاب النكاح صفحہ ٣٧٢ - ٣٧٣]
 — فتجب (النفقة) للزوجة بنكاح صحيح [رد المحتار جلد ثاني كتاب النكاح صفحہ ٦٩٩]
 لا نفقة ... لصغيرة لاوطأ و... ناشئة — وكذا ان صلحت ... للاستيناس ولم يمسكها في بيته — [رد المحتار جلد ثاني كتاب النكاح صفحہ ٧٠١]
 وحكمه حل استمتاع كل منهما بالآخر ... وحرمة المصاهرة ... و... ملك الحبس والقيد ... و... الارث من الجانبين ... و... وجوب عاقدته عليها ... و... ولاية تاديبها — [البحر الرائق جلد ثالث كتاب النكاح صفحہ ٨٣ - ٨٤]
 ولها منعه من الوطئ ... لاخذ ما بين تعجيله — [رد المحتار جلد ثاني كتاب النكاح صفحہ ٣٨٨]

Radd-ul-Muhtâr, Vol. 2, pp. 279, 280, 362, 363, 388, 699, 701 ;
Bahr-ul-Rayek, Vol. 3, pp. 83, 84.

ARTICLE 18.

(مادة ١٨) — ويجب مهر المثل في نكاح فاسد (وهو الذي فُقد شرطاً من شرائط الصحة كشهود) بالوطئ في القبل ... و... يجب ... التفريق بينهما ... ان لم يفتروا ... و... الارث ... لا يثبت فيه — [رد المحتار جلد ثاني كتاب النكاح صفحہ ٣٧٩ - ٣٨٠ - ٣٨١]

اذا وقع النكاح فاسداً ... فان لم يكن دخل بها فلا مهر لها ... والنكاح الفاسد لا حكم له قبل الدخول - حتى لو تزوج امرأة نكاحاً فاسداً بان مسَّ امها بشهوة ثم تركها له ان يتزوج الأم - [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ٤٠]

Radd-ul-Muhtâr, Vol. 2, pp. 379, 380, 381 ; Fatawa-i-Alamgiri, Vol. 2, p. 40.

CHAPTER III.

الباب الثالث في موافع النكاح الشرعية وبيان المحلات والمكرمات من النساء

ARTICLE 19.

(مادة ١٩) — وللحر ان يتزوج اربعا ... من العرائر والاماء ... جمعاً وتفرقاً — [فتح القدير جلد ثاني كتاب النكاح صفحہ ٣١]
Fath-ul-Kadîr, Vol. 2, p. 31.

ARTICLE 20.

(مادة ٢٠) — ومنها المعلن القابل وهي المرأة التي أحلها الشرع بالنكاح — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ١]

Fatawa-i-Alamgiri, Vol. 2, p. 1.

ARTICLE 21.

(مادة ٢١) — حرمة النكاح على نوعين مؤبدة - وغير مؤبدة فالمؤبدة تثبت بالنسب والرضاع والصهرية ... واما المحرمات لا على سبيل التأييد ... منها الزيادة على العدد المشروع ... والجمع بين الاختين — [فتاوى قاضیخان جلد اول — كتاب النكاح صفحہ ١٦٥ - ١٦٧]

والجمع بين المحارم والاجنبیات ... حق الغير كالمذكوة والمعددة والعامل بثابت النسب ... عدم الدين السماوي — [فتح القدیر جلد ثاني كتاب النكاح صفحہ ١٦٥]
المحرمات بالطلاق — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ١١]

Fatawa-i-Kazi Khan, pp. 165—167; Fath-ul-Kadir, Vol. 2, p. 16; Fatawa-i-Alamgiri, Vol. 2, p. 11.

ARTICLE 22.

(مادة ٢٢) — المحرمات بالنسب ... فالامهات أم الرجل وجداته من قبل ابيه وأمه وان علون - واما البنات فبنته الصلبية وبنات ابنة وبنقه وان سفلى — واما الاخوات فالاخت لاب وام والاخت لاب والاخت لام وكذا بنات الاخ والاخت وان سفلى — والعمات فثلث عمه لاب وام وعمه لام وكذا عمات ابيه وعمات اجداده وعمات امه وعمات جداته وان علون ... واما الخالات فخالة لاب وام وخالة لاب وخالة لام وخالات آبائه وامهاته — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ٥]

وتحل بنات العمات والاعمام والخالات والاخوال — [فتح القدیر جلد ثاني كتاب النكاح صفحہ ١٦]

كما يحرم على الرجل ان يتزوج بمن ذكر يحرم على المرأة ان تتزوج بنظير من ذكر — [رد المحتار جلد ثاني كتاب النكاح صفحہ ٣٠٠]

Fatawa-i-Alamgiri, Vol. 2, p. 5; Fath-ul-Kadir, Vol. 2, p. 16; Rodd-ul-Muhtâr, Vol. 2, p. 300.

ARTICLE 23.

(مادة ٢٣) — وحرم بالمصاهرة بنت زوجته الموطوءة — [الدر المختار جلد ثاني كتاب النكاح صفحہ ٢]

لو تزوج صغيرة لا تشتهى فدخل بها وطلقها وانقضت عدتها وتزوجت بآخر جاز له تزوج بنتها — [البحر الرائق جلد ثالث كتاب النكاح صفحة ١٠٧]

وام زوجته وجداتها مطلقاً بمجرد العقد الصحيح وان لم توطأ ... وزوجة اصله وفرعه مطلقاً — [الدر المختار جلد ثاني كتاب النكاح صفحة ٢]

Durrul-Mukhtâr, Vol. 2, p. 2; Bahrr-ul-Rayek, Vol. 3, p. 107.

ARTICLE 24.

(مادة ٢٤) — فمن زنى بامرأة حرمت عليه امها وان علت وابنتها وان سفلت وكذا تعرم المزنئى بها على آباء الزاني واجدادها وان علوا وابنائها وان سفلوا — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٥]

ويحل لاصول الزاني وفرعه اصول المزنئى بها وفرعها — [رد المختار جلد ثاني كتاب النكاح صفحة ٣٠٣]

Fatawa-i-Alamgiri, Vol. 2, p. 5; Radd-ul-Mukhtâr, Vol. 2, p. 303.

ARTICLE 25.

(مادة ٢٥) — وحرم الكل مما مرّ تحريره نسبا ومصاهرة — رضاعا الا ما استثنى في باب — [الدر المختار جلد ثاني كتاب النكاح صفحة ٥]

Durrul-Mukhtâr, Vol. 2, p. 2.

ARTICLE 26.

(مادة ٢٦) — لا يجمع بين اختين ... لا يجوز ان يتزوج اخت معتدته ... والاصل ان كل امرأتين لو صورنا اهدهما من اي جانب ذكرأ لم يجوز النكاح بينهما برضاع او نسب لم يجوز الجمع بينهما ... فلا يجوز الجمع بين امرأة وعمتها ... او خالتها كذلك ونحوه — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٧ - ٨ - ٩]

Fatawa-i-Alamgiri, Vol. 2, pp. 7, 8, 9.

ARTICLE 27.

(مادة ٢٧) — لا يجوز للرجل ان يتزوج زوجة غيره وكذلك المعتدة ... سواء كانت العدة عن طلاق او وفاة او دخول في نكاح فاسد او شبهة نكاح — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٩]

Fatawa-i-Alamgiri, Vol. 2, p. 9.

ARTICLE 28.

(مادة ٢٨) — وإن كان الطلاق ثلثاً ... لم تعد له حتى تنكح زوجاً غيره
نكاحاً صحيحاً ويدخل بها ثم يطلقها أو يموت عنها — [فتاوى عالمگیری جلد ثاني
كتاب الطلاق صفحة ١٢٨]
Fatawa-i-Alamgiri, Vol. 2, 128.

ARTICLE 29.

(مادة ٢٩) — وحبلن ثابت النسب لا يجوز نكاحها ... يجوز أن يتزوج امرأة حاملاً
من الزنا ولا يطأها حتى تفضح — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٩]
Fatawa-i-Alamgiri, Vol. 2, p. 9.

ARTICLE 30.

(مادة ٣٠) — لا نكاح ... خامسة في عدة الرابعة — [شرح الوقاية جلد ثاني
كتاب النكاح صفحة ١٨]
Sharh-i-Vicaya, Vol. 2, p. 18.

ARTICLE 31.

(مادة ٣١) — ويجوز للمسلم نكاح الكفائية الحرة والذمية حرة كانت أو أمّة ...
والاولى أن لا يفعل — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ١٠]
Fatawa-i-Alamgiri, Vol. 2, p. 10.

ARTICLE 32.

(مادة ٣٢) — لا يصح نكاح عابدة كوكب لا كذاب لها ... والمجوسية والوثنية ...
[الدر المختار جلد ثاني كتاب النكاح صفحة ٤]
Durrul-Mukhtâr, Vol. 2, p. 4.

CHAPTER IV.

الباب الرابع فى الولاية على النكاح وفيه فصلان

SECTION I.

الفصل الاول في بيان الولي و شروطه

ARTICLE 33.

(مادة ٣٣) الولي ... البالغ العاقل الوارث ولو فاسقاً ... بشرط حرية وتكليف
و اسلام في حق مسلمة تريد الزوج وولد مسلم — [الدر المختار جلد ثاني كتاب النكاح
صفحة ٤-٦]
Durrul-Mukhtâr, Vol. 2, pp. 4, 6.

ARTICLE 34.

(مادة ٣٤) — الولي شرط صفة كاح صغير ومجنون و رقيق لا مكلفة . فنفذ كاح حرة مكلفة بلا رضا ولي — [الدر المختار جلد ثاني كتاب النكاح صفحہ ٥]

Durrul-Mukhtâr, Vol. 2, p. 5.

ARTICLE 35.

(مادة ٣٥) — الولي في الكاح ... العصبية بنفسه ... على ترتيب الارث والعجب — [الدر المختار جلد ثاني كتاب النكاح صفحہ ٦]

و اقرب الاولياء الي المرأة الابن ثم ابن الابن وان سفل ثم الاب ثم الجدة ابو الاب وان علا ... ثم الاخ لاب و أم ثم الاخ لاب ثم ابن الاخ لاب و أم ثم ابن الاخ لاب وان سفلا ثم العم لاب و أم ثم العم لاب ثم ابن العم لاب و أم ثم ابن العم لاب ... ثم مولى العتاقة — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ١١]

فيقدم ابن المجنونة على ابيها — [الدر المختار كتاب النكاح جلد ثاني صفحہ ٦]

Durrul-Mukhtâr, Vol. 2, p. 6; Fatawa-i-Alamgiri, Vol. 2, p. 11.

ARTICLE 36.

(مادة ٣٦) — فان لم يكن عصبية فالولاية للأم ثم لام الاب ... ثم للبنت ثم لبنت الابن ثم لبنت البنت ثم لبنت ابن الابن ثم لبنت بنت البنت وهكذا ثم للجد الفاسد ثم للاخت لاب و أم ثم للاخت لاب ثم لولد الام ... ثم لاولادهم ثم لذوي الارحام العمات ثم الاخوال ثم الخالات ثم بنات الاعمام وبهذا الترتيب اولادهم — [الدر المختار جلد ثاني كتاب النكاح صفحہ ٦]

Durrul-Mukhtâr, Vol. 2, p. 6.

ARTICLE 37.

(مادة ٣٧) — ثم للسلطان ثم لقاض نص له عليه في منشورة — [الدر المختار جلد ثاني كتاب النكاح صفحہ ٦]

Durrul-Mukhtâr, Vol. 2, p. 6.

ARTICLE 38.

(مادة ٣٨) — ليس للرعي ... ان ينزوج اليتيم مطلقا وان اوصى اليه الاب بذلك ... نعم لو كان قريبا او حاكما يملكه بالولاية — [الدر المختار جلد ثاني كتاب النكاح صفحہ ٦]

Durrul-Mukhtâr, Vol. 2, p. 6.

ARTICLE 39.

(مادة ٣٩) — لا ولاية في نكاح ولا في مال لمسلم على كافرة الا بالسبب العام بان يكون المسلم... سلطانا او نائبه — وللکافر ولاية على کافر مثله — [الدرالمختار جلد ثاني کتاب النکاح صفحہ ٦]

Durrul-Mukhtār, Vol. 2, p. 6.

ARTICLE 40.

(مادة ٤٠) — وان زوج الصغير او الصغيرة ابعد الاولياء فان كان الاقرب حاضراً وهو من اهل الولاية توقف نكاح الابعد على اجازته — [فتاوى عالمگیری جلد ثاني کتاب النکاح صفحہ ١٢]

و للولي الابعد التزويج بغيبة الاقرب ... ما لم ينقصر الكفو الغاطب
جوابه ... ولا يبطل تزويجه ... بعود الاقرب — [الدرالمختار جلد ثاني کتاب النکاح صفحہ ٦]

وان لم يكن من اهل الولاية ... جاز — [فتاوى عالمگیری جلد ثاني کتاب النکاح صفحہ ١٢]

Fatawa-i-Alamgiri, Vol. 2, p. 12; Durrul-Mukhtār, Vol. 2, p. 6.

ARTICLE 41.

(مادة ٤١) — اذا خطبها كفوء و عضلها الولي تثبت الولاية للقاضي نيابة عن العاضل فله التزويج وان لم يكن في منشورة ... عند فوت الكفو ... اي بامتناعه عن التزويج ... من كفوء بهر المثل ... لا يبطل تزويجه — انها تنتقل الى الا بعد بعض الاقرب اجماعا — فالمراد بالابعد القاضي — اما لو امتنع عن غير الكفو او لكون المهر اقل من مهر المثل فليس بعاضل — [الدرالمختار جلد ثاني کتاب النکاح صفحہ ٣٤٢]

Radd-ul-Mukhtār, Vol. 2, p. 342.

ARTICLE 42.

(مادة ٤٢) — وان اجتمع للصغير والصغيرة و ايمان مستويان ... فايهما — زوج جاز — [فتاوى عالمگیری جلد ثاني کتاب النکاح صفحہ ١٢]

Fatawa-i-Alamgiri, Vol. 2, p. 12.

ARTICLE 43.

(مادة ٤٣) — ليس للقاضي تزويج الصغيرة من نفسه ... وامرأته وفروعها —
[رد المختار جلد ثاني كتاب النكاح صفحة ٣٤٠]

Radd-ul-Muhtâr, Vol. 2, p. 340.

SECTION II.

الفصل الثاني في نكاح الصغير والصغيرة و من يلحق بهما والكبير والكبيرة المكلفين

ARTICLE 44.

(مادة ٤٤) — وللولي ... انكاح الصغير والصغيرة جبراً ولو ثيباً كعتوة
ومجنون شهراً — [الدر المختار جلد ثاني كتاب النكاح صفحة ٥]

Durrul-Mukhtâr, Vol. 2, p. 5.

ARTICLES 45 & 46.

(مادة ٤٥ - ٤٦) — ولزم النكاح ولو بغين فاحش بنقص مهرها وزيادة مهره او
زوجها بغير كفره ان كان الولي المزوج بنفسه ... اباً او جدّاً — وكذا ... ابن المجنونة لم
يعرف منها سوء الاختيار مجانّة وفسقاً وان عرف لا يصح النكاح — [الدر المختار
جلد ثاني كتاب النكاح صفحة ٥٦]

Durrul-Mukhtâr, Vol. 2, p. 56.

ARTICLE 47.

(مادة ٤٧) — وان كان المزوج ... غير الاب و ابنه ... ولو القاضي لا يصح النكاح
من غير كفره او بغين فاحش ... وان كان من كفره وبمهر المثل صح — ولكن لهما
اي لصغير وصغيرة ... خيار الفسخ ولو بعد الدخول بالبلوغ او العلم بالنكاح بعده —
[الدر المختار جلد ثاني كتاب النكاح صفحة ٦]

Durrul-Mukhtâr, Vol. 2, p. 6.

ARTICLE 48.

(مادة ٤٨) — اذا كان المزوج للصغير والصغيرة غير الاب والجد فلهما الخيار
بالبلوغ ... فان اختار الفسخ لا يثبت الفسخ الا بشرط القضاء ... فيتوارثان ... في هذا
النكاح قبل ثبوت فسخه ... ويلزم كل المهر ... بوث احدهما — [رد المختار جلد ثاني
كتاب النكاح صفحة ٣٣٢]

Radd-ul-Muhtâr, Vol. 2, p. 332.

ARTICLE 49.

(مادة ٤٩) — بطل خيار ... من بلغت و هي بكر ... بالسكوت لو مختارة عالمة باصل النكاح ... ولا يمتدُّ الى آخر المجاس ... اذا بلغت و هي عالمة بالنكاح او علمت به بعد بلوغها فلا بد من القسح في حال البلوغ او العلم ... وتشهد قائلة بلغت الان وان جهلت ... بان لها خيار البلوغ او بانه لا يمتد ... فلم تعذر بالجهل — [رد المحتار جلد ثاني كتاب النكاح صفحه ٣٣٥ - ٣٣٦]

ثم اذا اختارت واشهدت ولم تقدم الى القاضي الشهر والشهرين فهي على خيارها — [فتح القدير جلد ثاني كتاب النكاح صفحه ٥٣]

Radd-ul-Muhtâr, Vol. 2, pp. 335, 336 ; Fath-ul-Kadir, Vol. 2, p. 53.

ARTICLE 50.

(مادة ٥٠) — وان كانت ثيباً ... لا يبطل خيارها بالسكوت ... وانما يبطل خيارها اذا رضيت بالنكاح صريحاً او يوجد منها فعل يستدل به على الرضا ... اذا لم تعلم بالعقد ساعة ما بلغت كان لها الخيار اذا علمت — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحه ١٣]

Fatawa-i-Alamgiri, Vol. 2, p. 13.

ARTICLE 51.

(مادة ٥١) — وينعقد نكاح العرة العقلة البالغة برضاها وان لم يعقد عليها ولي بكرة كانت او ثيباً — [هداية جلد ثاني كتاب النكاح صفحه ٢٩٣]

Hidaya, Vol. 2, p. 293.

ARTICLE 52.

(مادة ٥٢) — فنقض نكاح حرة مكلفة بالرضا ولي ... وللولي اذا كان عصبه الاعتراض في تزويجها نفسها باقل من مهر مثلها حتى يتم مهر المثل او يفرق القاضي ... وله ... اذا كان عصبه ... الاعتراض في غير الكفوء ... ويفتق في غير الكفوء بعدم جواز اصله ... اذا كان لها ولي لم يرض به قبل العقد فلا يفيد الرضا بعده ... وانما اذا لم يكن لها ولي فهو صحيح ... وانما تحلل في الصورة الرابعة — وهي رضا الولي بغير الكفوء — [رد المحتار جلد ثاني كتاب النكاح صفحه ٣٢١ - ٣٢٢]

Radd-ul-Muhtâr, Vol. 2, pp. 321, 322.

ARTICLE 53.

(مادة ٥٣) — ولا تجبر البالغة البكر على النكاح ... فان استأذنها ... الولي ... او وكيله او رسوله او زوجها وليها واخبرها رسوله او فضولي عدل فسكتت عن رده مختارة او ضحك

غير مستهزئة أو تبسمت أو بكّت بلا صوت ... فهو اذن ... و اجازة في الثاني ... ان علمت
بالزوج — [الدر المختار جلد ثاني كتاب النكاح صفحة ٥]

والثيب احق بنفسها — [فتح القدير جلد ثاني كتاب النكاح صفحة ٤٤]

فان استأذنها غير الاقرب ... فلا عبوة لسكوتهما — بل لابد من القول ... او ما هو
في معناها — [الدر المختار جلد ثاني كتاب النكاح صفحة ٥]

Fath-ul-Kadir, Vol. 2, p. 44 ; Durru-l-Mukhtâr, Vol. 2, p. 5.

ARTICLE 54.

(مادة ٤٤) — الولي اذا زوج الثيب فرغيت بقلبها ولم تظهر الرضا بلسانها كان لها
ان ترد لان المعتبر فيها الرضا باللسان او الفعل الذي يدل على الرضا — [رد المختار جلد
ثاني كتاب النكاح صفحة ٣٢٧]

Radd-ul-Muhtâr, Vol. 2, p. 327.

ARTICLE 55.

(مادة ٥٥) — من زالت بكارتها بوثية ... او درور حيض او حصول جراحة او تعذيس ...
بكر حقيقة — كنفر يق بعب او عنة او طلاق او موت بعد خلوة قبل وطئ او زنا —
وهذه فقط بكر حكما ان لم تذكر ولم تُعَدَّ به — و الا فثيب كموطوءة بشبهة او نكاح
فاسد — [الدر المختار جلد ثاني كتاب النكاح صفحة ٥]

Durru-l-Mukhtâr, Vol. 2, p. 5.

ARTICLE 56.

(مادة ٥٦) — واذا نقد الزوج المهر — وطلب من القاضي ان يأمر ابا المرأة بتسليم
المرأة — فقال ابوها انها صغيرة لا تصلح للرجال ولا تطيق الجماع — وقال الزوج بل هي تصلح
وتطيق ... امر من يثق بهن من النساء ان ينظرن اليها — فان قلن انها تطيق الجماع
وتحتمل الرجال أمر الاب بدنعمها الزوج — وان قلن لا تحتمل الرجال لا يؤمر بتسليمها
الى الزوج ... انه لا عبوة للسنة في هذا الباب — [فتاوى عالمكيوي جلد ثاني كتاب
النكاح صفحة ٣]

Fatawa-i-Alamgiri, Vol. 2, p. 13.

CHAPTER V.

الباب الخامس فى الوكالة بالنكاح

ARTICLE 57.

(مادة ٥٧) — كل من يجوز تصرفه في ماله بولاية نفسه يجوز نكاحه على نفسه —

[البحر الرائق جلد ثالث كتاب النكاح صفحة ١١٧]

و يصح التوكيل بالنكاح — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ١٨]

Bahr-ul-Rayek, Vol. 3, p. 117; Fatawa-i-Alamgiri, Vol. 2, p. 18.

ARTICLE 58.

(مادة ٥٨) — و يصح التوكيل بالنكاح — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ١٨]

لا تشترط الشهادة على الوكالة بالنكاح ... بل ... يشهد على الوكالة اذا خيف جحد
الموكل ايها — رد المحتار جلد ثاني كتاب النكاح صفحة ٣٥٢]

Fatawa-i-Alamgiri, Vol. 2, p. 18; Radd-ul-Muhtâr, Vol. 2, p. 352.

ARTICLE 59.

(مادة ٥٩) — ليس للموكل ان يوكل بالا اذن ... ما لم تفوض له الامر — [رد المحتار

جلد ثاني كتاب النكاح صفحة ٣٢٥]

Radd-ul-Muhtâr, Vol. 2, p. 325.

ARTICLE 60.

(مادة ٦٠) — فلا مطالبة عليه في النكاح بمهر وتسليم للزوجة — [رد المحتار جلد

رابع كتاب الوكالة صفحة ٤٤٣]

Radd-ul-Muhtâr, Vol. 4, p. 443.

ARTICLE 61.

(مادة ٦١) — لو امر بمعيئة ... فخالف ... لم يجوز ... لا ينفذ للمخالفة ...

وفي كل موضع لا ينفذ فعل الوكيل فالعقد موقوف على اجازة الموكل — [رد المحتار

جلد ثاني كتاب النكاح صفحة ٣٥٢ - ٣٥٣]

Radd-ul-Muhtâr, Vol. 2, pp. 352, 353.

CHAPTER VI.

الباب السادس في الكفائة

ARTICLE 62.

(مادة ٦٢) — الكفاءة معتبرة ... من جانب أبي الرجل ... لا ... من جانبها ...

يجوز ان تكون دونه فيها — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٤٣ - ٣٤٤]

الكفاءة هي حق الولي ... بل هي حق لها ايضا ... و ... اعتبارها عند ابتداء العقد —

فلا يضر زوالها بعده — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٤٤ - ٣٤٩]

Radd-ul-Muhtâr, Vol. 2, pp. 343, 344, 349.

ARTICLE 63.

(مادة ٦٣) — ان المرأة اذا زوجت نفسها من كفوء لزم على الاولياء — وان زوجت من غير كفوء لا يلزم او لا يصح ... ان غير الاب و الجد لوزوج الصغير و الصغيرة غير كفوء لا يصح — ومقتضاه ان الكفاءة للزوج معتبرة ... او زوجها بغير كفوء ان كان الولي المزوج بنفسه ... اباً او جداً ... لم يعرف منهما سوء الاختيار مجاناً وفسقاً — وان عرف لا يصح النكاح — [فذاوى عالمكيوي جلد ثاني كتاب النكاح صفحه ١٨ —] البحر الرائق جلد ثالث كتاب النكاح صفحه ١٤٤]

و تعتبر الكفاءة للزوم النكاح ... نسباً ... هذا في العرب ... واما في العجم فتعتبر ... حرية و اسلاماً ... و ديانة ... و مالا ... و حرفه — [رد المحتار جلد ثاني كتاب النكاح صفحه ٣٤٤ - ٣٤٥ - ٣٤٦ - ٣٤٧ - ٣٤٨]

Radd-ul-Muhtâr, Vol. 2, pp. 344, 345, 346, 347, 348; Fatawa-i-Alam-giri, Vol. 2, p. 18; Bahrr-ul-Rayek Vol. 3, p. 144.

ARTICLE 64.

(مادة ٦٤) — الاسلام معتبر ... بالنظر الى نفس الزوج — لا الى ابيه و جدّه ... فمسلم بنفسه ... غير كفوء لمن ابوها مسلم ... ومن ابوه مسلم ... غير كفوء لذات ابوين ... في الاسلام ... فمن له اب وجد في الاسلام ... كفوء لمن له آباء — [رد المحتار جلد ثاني كتاب النكاح صفحه ٣٤٦]

Radd-ul-Muhtâr, Vol. 2, p. 346.

ARTICLE 65.

(مادة ٦٥) — الحسيب يكون كفوء للنسيب — فالعالم العممي يكون كفوء للجهل العربي و العلوية — لان شرف العلم فوق شرف النسب ... و العالم الفقير يكون كفوء للمغني الجهل — [رد المحتار جلد ثاني كتاب النكاح صفحه ٣٥٠]

Radd-ul-Muhtâr, Vol. 2, p. 350.

ARTICLE 66.

(مادة ٦٦) — فلا تشترط القدرة على الكل ولا ان يساويها في الغني ... بان يقدر على المعجل و نفقة شهر لو غير معترف — والا فان كان يكسب كل يوم كفايتها ... فهو كفوء — [رد المحتار جلد ثاني كتاب النكاح صفحه ٣٤٨]

Radd-ul-Muhtâr, Vol. 2, p. 348.

ARTICLE 67.

(مادة ٦٧) — فلفاسق لا يكون كفؤ لصالحة بنت صالح — بل يكون كفؤ لفاسقة بنت فاسق — وكذا الفاسقة بنت صالح — [رد المختار جلد ثاني كتاب النكاح صفحة ٣٤٧] *Radd-ul-Muhtâr, Vol. 2, p. 347.*

ARTICLE 68.

(مادة ٦٨) — لو كان من العرب من اهل البلاد من يعترف بنفسه تعبير فيهم الكفائة فيها ... ان العرف اذا تباعدت لا يكون افراد احدا كما كفؤ لافراد الاخرى — بل افراد كل واحدة اكفاء بعضهم لبعض ... فاناد ان العرف اذا تقاربت او اتحدت يجب اعتبار النكافؤ من بقية الجهات ... و افاد ... انه لا يلزم اتحادهما في العرفة بل التقارب كاف ... ان الموجب هو استنقاص اهل العرف فيدور معه ... واجاب ابو يوسف رح على عادة اهل البلاد وانهم يتخذون ذلك حرفة فيعيرون بالدني منها — [رد المختار جلد ثاني كتاب النكاح صفحة ٣٤٨]

Radd-ul-Muhtâr, Vol. 2, p. 348.

ARTICLE 69.

(مادة ٦٩) — ولو زوجها برضاها ولم يعلموا بعدم الكفائة ثم علموا لاخيار لاحد — الا اذا شرطوا الكفائة او اخبرهم بها وقت العقد فزوجوها على ذلك ثم ظهر انه غير كفؤ كان لهم الخيار ... هذا في الكبيرة — [رد المختار جلد ثاني كتاب النكاح صفحة ٣٤٤]

Radd-ul-Muhtâr, Vol. 2, p. 344.

CHAPTER VII.

الباب السابع في المهر

SECTION I.

الفصل الاول في بيان مقدار المهر وما يصلح تسميته مهرا وما لا يصلح

ARTICLE 70.

(مادة ٧٠) — اقله عشرة دراهم ... فضة وزن سبعة مثاقيل ... مضروبة كانت او لا ... بالغ ما بلغ — [رد المختار جلد ثاني كتاب النكاح صفحة ٣٥٦ - ٣٥٧] و ... يعتبر حاله عملا بالنص ... على الموسع قدرة — [هداية جلد ثاني كتاب النكاح صفحة ٣٥٥]

Radd-ul-Muhtâr, Vol. 2, pp. 356, 357, 358; Hidaya, Vol. 2, p. 305.

ARTICLE 71.

(مادة ٧١) — المهر انما يصح بكل ما هو مال متقوم و المنافع تصلح مهرا —
 [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٢٢] ولا بد من كونها مما يستحق المال
 بمقابلتها — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٥٧]

Fatawa-i-Alamgiri, Vol. 2, p. 22 ; Radd-ul-Muhtar, Vol. 2, p. 357.

ARTICLE 72.

(مادة ٧٢) — اذا سمى ما ليس بمال للعالم من كل وجه ... لا يصح التسمية
 و كان لها مهر المثل — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٢٣]

Fatawa-i-Alamgiri, Vol. 2, p. 23.

ARTICLE 73.

(مادة ٧٣) — وان شرطوا في العقد تعجيل كل المهر يجعل الكل معجلا ...
 و اذا كان المهر مؤجلا اجلا معلوما فعل الاجل ... ولو كان بعضه عاجلا وبعضه
 آجلا فاستوفت العاجل ... كما جرت العادة في ديارنا ... تاجيل المهر الى غاية
 معلومة ... صحيح ... تاجيل البعض صحيح — [فتاوى عالمگیری جلد ثاني كتاب النكاح
 صفحة ٣٢ - ٣٣]

Fatawa-i-Alamgiri, Vol. II., pp. 32, 33.

SECTION II.

الفصل الثاني في وجوب المهر

ARTICLE 75.

(مادة ٧٥) — تجب العشرة ان سهاها او دونها و يجب الاكثر منها ان سمى
 الاكثر ... بالغ ما بلغ — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٥٨]

Radd-ul-Muhtar, Vol. 2, p. 358.

ARTICLE 76.

(مادة ٧٦) — يجب مهر المثل فيما اذا لم يسم مهرا او نفيا ان وطى
 الزوج ... او سمى خمرا او خذريا ... او دابة او ثوبا ... لم يبين جنسها وجب
 مهر المثل في الشغار ... للامهار و في تعليم القرآن — [الدرالمختار جلد ثاني
 كتاب النكاح صفحة ٨ - ٩]

Durrul-Mukhtar, Vol. 2, pp. 8, 9.

ARTICLE 77.

(مادة ٧٧) — والحرة مهر مثلها ... مهر امرأة تماثلها من قوم ايها لا امها أن لم تكن من قوم ايها ... ويعتبر باخواتها وعماتها ... وتعتبر الممالة في الأوصاف وقت العقد سناً وجمالاً ومالاً وبلداً وعصراً وعقلاً وديناً وبكارةً وثبوتاً وعفةً وعلماً وادباً ... وعدم ولدٍ ويعتبر حال الزوج ايضاً — فإن لم يوجد من قبيلة ايها فمن الأجانب أي فمن قبيلة تماثل قبيلة ايها — ويشترط في ثبوت مهر المثل ... اخبار رجلين او رجل وامرأتين ولفظ الشهادة فإن لم يوجد شهود عدول فالقول للزوج بيمينه — [ردالمحتار جلد ثاني كتاب النكاح ١٠ - ١١ صفحة]

Durrul-Mukhtár, Vol. 2, pp. 10, 11.

ARTICLE 78.

(مادة ٧٨) — فإذا تزوجت بلا مهر وطلبت من الزوج أن يفرض لها مهر مثلها فامتنع ورافعته إلى القاضي وأتت بشاعدين شهدا بأن فلانة من قوم ايها تساويها في الصفات المذكورة وانها تزوجت بكذا يحكم لها القاضي بمثل مهر فلانة المذكورة — [ردالمحتار جلد ثاني كتاب النكاح صفحة ٣٥٨] — ولو لم يفعل ذاب منابه في الفرض ... وما فرض بتراضيها او بفرض قاض مهر المثل بعد العقد الخالي عن المهر — [ردالمحتار جلد ثاني كتاب النكاح صفحة ٣٦٥]

Radd-ul-Muhtár, Vol. 2, pp. 358, 365.

ARTICLE 79.

(مادة ٧٩) — أن الأب و الجد لو زوج ابنه ثم زاد في المهر ص ... بشرط قبولها في المجلس او قبول ولي الصغيرة و معرفة قدرها و بقاء الزوجية — [ردالمحتار جلد ثاني كتاب النكاح صفحة ٣٦٥]

Radd-ul-Muhtár, Vol. 2, p. 365.

ARTICLE 80.

(مادة ٨٠) — وصح حطبها لكله او بعضه عنه ... اذا كان المهر ... دراهم او دنانير لان الحط في الاعيان لا يصح ... و ... ان حط ايها غير صحيح لو صغيرة ولو كغيرة توقف على اجازتها ولا بد من رضاها — [ردالمحتار جلد ثاني كتاب النكاح صفحة ٣٦٦]

Radd-ul-Muhtár, Vol. 2, p. 366.

SECTION III.

الفصل الثالث في الاسباب التي توكد لزوم المهر بتمامه للمرأة
والاحوال التي يجب لها فيها نصف المهر والتي
لا تستحق فيها شيئاً منه

ARTICLE 81.

(مادة ٨١) — و ... يتأكد لزوم تمامه ... عند وطئ او خلوة صحت من الزوج
او موت احدهما ... (و ما فرض بقرائيهما او بفرض قاض مهر المثل بعد العقد الغالي ...
او زيد على ما سمي فانها تلزمه - ردالمحتار جلد ثاني كتاب النكاح صفحہ ٣٧٥)
(ويجب مهر المثل في نكاح فاسد - ردالمحتار جلد ثاني كتاب النكاح صفحہ ٣٧٩) و اذا
تأكد المهر بما ذكر لا يسقط بعد ذلك و ان كانت الفرقة من قبلها ... الا بالبراء —
[ردالمحتار جلد ثاني كتاب النكاح صفحہ ٣٥٨]

Radd-ul-Muhtâr, Vol. 2, pp. 358, 365, 379.

ARTICLE 82.

(مادة ٨٢) — و خلوة بلا مائع وطئ حصا او شرعا او طبعاً ... توكد ... المهر
بالخاوة اجتماعهما بحيث لا يكون معهما عاقل في مكان لا يطلع عليهما احد يغير اذلهما ...
و يكون الزوج عالماً بانها امراته — [شرح الوقايہ جلد ثاني كتاب النكاح صفحہ ٣٦]
Sharh-i-Vikaya, Vol. 2, p. 36.

ARTICLE 83.

(مادة ٨٣) — و الخلوة ... كالوطئ ... ولو كان الزوج ... عينا ... في
ثبوت النسب ... وفي تأكد المهر ... (في خلوة النكاح الصحيح) ... و النفقة
و السكني ... و حرمة نكاح اختها و اربع موالها في عدتها — [ردالمحتار جلد ثاني
كتاب النكاح صفحہ ٣٦٦ - ٣٦٩ - ٣٧٠]

لا تكون كالوطئ في ... الاحصان و حرمة البنات و حلها للول و الرجعة
و الميراث اى لو طلقها و مات وهي في عدة الخلوة لا ترث — [ردالمحتار جلد ثاني
كتاب النكاح صفحہ ٣٧٠ - ٣٧١]

Radd-ul-Muhtâr, Vol. 2, pp. 366, 369, 370, 371.

ARTICLE 84.

(مادة ٨٤) — و يجب ... نصف المهر ... ان سماها ... وقت العقد ...
بطلاق قبل وطئ او خلوة ... و عاد النصف الى ملك الزوج ... بالطلاق المجرد عن

القضاء والرضاء ... اذا لم يكن مسلما لها ... ان الزيادة المتولدة قبل القبض تنصف ...
اذا حدثت الزيادة قبل الطلاق او بعده — [رد المحتار جلد ثاني كتاب النكاح
صفحة ٣٥٩ - ٣٦٠]

وان كان مسلما لها لم يبطل ملكها منه بل توقف عودها الى ملكه على القضاء او
الرضاء فلهذا لا نفاذ ... اى الزوج ... بعد طلاقها قبل القضاء ... و الرضاء ونفذ
تصرف المواة ... قبل القضاء في الكل لبقاء ملكها — [رد المحتار جلد ثاني
كتاب النكاح صفحة ٣٦٠]

وعليها نصف قيمة الاصل يوم القبض ... فلقض من نصف قيمته للزوج ...
لان الزيادة في المهر اما متصلة متولدة من الاصل ... او غير متولدة ... او منفصلة
متولدة ... او غير متولدة — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٦٠]

او زيد على ما سمي ... لا ينصف ... بالطلاق قبل الدخول — [رد المحتار
جلد ثاني كتاب النكاح صفحة ٣٦٥ - ٣٦٦]

Radd-ul-Muhtâr, Vol. 2, pp. 359, 360, 365, 366.

ARTICLE 85.

(مادة ٨٥) — طلقت قبل الوطي ... و الخلوة ... و المراد بالطلاق فرقة
جاءت من قبل الزوج ولم يشاركه صاحب المهر في سببها طلاقا كانت او فسحا
كالطلاق و الفرقة بالايلاء و اللعان ... والعنة و الردة و ابائه الاسلام و تقيلها ابنها
او امها بشهوة — فلو جاءت من قبلها كردتها و ابائها الاسلام و تقيلها ابنه بشهوة
والرضاع ... لا يجب نصف المسمى — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٧٤]
وعند ردتها يسترد منها الاصل مع الزيادة — [فتح القدير جلد ثاني كتاب النكاح
صفحة ٨٥]

Radd-ul-Muhtâr, Vol. 2, p. 364 ; Fath-ul-Kadir, Vol. 2, p. 80.

ARTICLE 86.

(مادة ٨٦) — وما فرض بقراضيهما او بفرض قاض مهر المثل بعد العقد ...
لا ينصف بالطلاق قبل الدخول ... [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٦٥]

(و الخلوة) — الطلاق الذي تجب فيه المتعة ما يكون قبل الدخول في نكاح
لا تسمية فيه سواء فرض بعده او لا او كانت التسمية فيه فاسدة ... و ... يجب فيما
لم تصح فيه التسمية من كل وجه — [رد المحتار جلد ثاني كتاب النكاح صفحة
٣٦٣ - ٣٦٥]

Radd-ul-Muhtâr, Vol. 2, pp. 363, 365.

ARTICLE 87.

(مادة ٨٧) — و يجب مهر المثل في نكاح فاسد ... بالوطي في القبل لا بغيره كالخلوة ... فلا تقام مقام الوطي - [ردالمحتار جلد ثاني كتاب النكاح صفحہ ٣٧٩ - ٣٨٠] ان الخلوة لم تقم مقام الوطي ... و في النكاح ... الفاسد ... مهر المثل ... بالغاً ما بلغ ان لم يسم ما يصلح مهر (و ان لم يكن ثمه مسمى فلها مهر المثل بالغاً ما بلغ — فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ٤٠) و الا فالأقل من مهر المثل او المسمى ... ان يكن دخل — [ردالمحتار جلد ثاني كتاب النكاح صفحہ ٣٨٢]

Radd-ul-Muhtâr, Vol. 2, pp. 379, 380, 382 ; Fatâwa-i-Alamgiri, Vol. 2, p. 40.

ARTICLE 88.

(مادة ٨٨) — المراقق اذا تزوج بلا إذن وليه امرأة ودخل بها فردَّ ابوها نكاحها قالوا لا يجب على الصبي ... عقر — [ردالمحتار جلد ثاني كتاب النكاح صفحہ ٤٠٠]

Radd-ul-Muhtâr, Vol. 2, p. 400.

ARTICLE 89.

(مادة ٨٩) — و ان كان المزوج ... غير الأب و ابیه ... ان كان من كفؤ و بمهر المثل صح و ... لهما ... خيار الفسخ ... بالبلوغ — [ردالمحتار جلد ثاني - كتاب النكاح صفحہ ٣٣٠ - ٣٣١]

فان كانت الفقرة ... قبل الدخول فلا مهر لها ... ان كانت منها — [البحر الرائق جلد ثالث كتاب النكاح صفحہ ١٣٠]

قيد بالطلاق ... للاحتراز عن فقرة جاءت من قبلها قبل الدخول فانه لا متعة لها — [البحر الرائق جلد ثالث - كتاب النكاح - صفحہ ١٥٨]

Radd-ul-Muhtâr, Vol. 2, pp. 330, 331 ; Bahrr-ul-Rayek, Vol. 3, pp. 130-158.

ARTICLE 90.

(مادة ٩٠) — يعتبر عرف كل بلدة لاهلها فيما تكتسي به المرأة عند الخروج ... و تعتبر المتعة بهالهما — [ردالمحتار جلد ثاني كتاب النكاح صفحہ ٣٧٤]

و لو دفع قيمتها اجبرت على القبول ... و لا تزيد على ... نصف مهر المثل لو الزوج غنيا و لا تنقص عن خمسة دراهم لو فقيرا — [ردالمحتار جلد ثاني كتاب النكاح صفحہ ٣٧٤]

فالمطلقة قبله ... وان سمي فغير واجبة ولا مستحبة ... و المطلقة بعده متعتها
مستحبة سمي لها او لا — رد المحتار جلد ثاني كتاب النكاح صفحة ٣٦٥ [*Radd-ul-Muhtâr, Vol. 2, pp. 364, 365.*

SECTION IV.

الفصل الرابع في شروط المهر

ARTICLE 91.

(مادة ٩١) — يسمى لها قدرا ومهر مثلها اكثر منه ويشترط منفعة لها ...
وكانت المنفعة مباحة الانتفاع متوقفة على فعل الزوج ... فان وفى بما شرطه .. فالمسمى
ولم يوف ... فمهر المثل ... ولو كان المشروط غير مباح ... وجب لها ... المسمى
وبطل المشروط ولا يكمل مهر المثل — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٧٤]
Radd-ul-Muhtâr, Vol. 2, p. 374.

ARTICLE 92.

(مادة ٩٢) — فان تزوجها بازيد من مهر مثلها على انها بكر فاذا هي غير بكر
لا تجب الزيادة — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٧٥]
Radd-ul-Muhtâr, Vol. 2, p. 375.

ARTICLE 93.

(مادة ٩٣) — لو رد في المهر بين الفلة والكثرة ... في مسألة القبح والجمال
... يصح الشرطان ... ويجب المسمى في اى شرط وجد — [رد المحتار جلد ثاني
كتاب النكاح صفحة ٣٧٥]
Radd-ul-Muhtâr, Vol. 2, p. 375.

ARTICLE 94.

(مادة ٩٤) — ولو شرط البكارة فوجدها ثيبا ... يجب كل المهر ... (المسمى)
... ويجب مهر المثل فيما اذا لم يسم مهرها — [رد المحتار جلد ثاني كتاب النكاح
[٣٦٣ - ٣٦٢]
Radd-ul-Muhtâr, Vol. 2, pp. 362, 363.

SECTION V.

الفصل الخامس في قبض المهر وما للمرأة من التصرف فيه

ARTICLE 95.

(مادة ٩٥) — للاب والجد والقاضي قبض صداق البكر صغيرة كانت او كبيرة
الا اذا تهنت وهي بالغة صح النهي وليس لغيرهم ذلك والوصى يملك ذلك على الصغيرة

و الذئب البالغة حق القبض لها دون غيرها — [رد المحتار جلد ثاني كتاب النكاح
صفحة ٤٠٠]

Radd-ul-Muhtâr, Vol. 2, p. 400.

ARTICLE 96.

(مادة ٩٦) — الام فليس لها القبض الا اذا كانت وصية وحينئذ فتطالب الام اذا
بلغت دون الزوج — [رد المحتار جلد ثاني كتاب النكاح صفحة ٤٠٠]

Radd-ul-Muhtâr, Vol. 2, p. 400.

ARTICLE 97.

(مادة ٩٧) — المهر في حالة البقاء حقها — [البحر الرائق - جلد ثالث -
كتاب النكاح صفحة ١٦١]

Bahrr-ul-Rayek, Vol. 3, p. 161.

ARTICLE 98.

(مادة ٩٨) — قبضت الف المهر فوهبتها له وطلقت قبل وطئ رجع عليها بنصفه
لعدم تعيين النقود في العقد وان لم تقبض او قبضت نصفه فوهبتها الكل في ...
الاولى او ما بقي وهو النصف في الذانية — [رد المحتار جلد ثاني كتاب النكاح صفحة
٣٧٣ - ٣٧٤] لم يرجع عليها بشيء [البحر الرائق جلد ثالث كتاب النكاح صفحة ١٦٩]
واذا وهبت الصداق من اجنبي وسلطته على القبض فقبض ثم طلقها قبل الدخول بها
رجع عليها بنصفه — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٣١]

فان تزوجها على الف فقبضتها ووهبتها له ثم طلقها قبل الدخول بها يرجع عليها
بخمسمائة وكذا اذا كان المهر مكيلا او موزونا ... لعدم تعيينها فان لم تقبض الالف حتى
وهبتها له ثم طلقها قبل الدخول بها لم يرجع واحد منهما على صاحبه بشيء ولو قبضت
خمسائة ثم وهبت الالف كلها المقبوض وغيرها او وهبت الباقي ثم طلقها قبل الدخول
بها لم يرجع واحد منهما على صاحبه بشيء — [فتاوى عالمگیری جلد ثاني كتاب النكاح
صفحة ٣١]

ولو تزوجها على ما يتعين بالتعيين كالعروض فوهبت له نصفه او كله ... ثم
طلقها قبل الدخول لم يرجع عليها بشيء — [فتاوى عالمگیری جلد ثاني كتاب النكاح
صفحة ٣١]

وليس للاب ان يهب مهر ابنته عند عامة العلماء — [فتاوى عالمگیری جلد ثاني
كتاب النكاح صفحة ٣١]

*Radd-ul-Muhtâr, Vol. 2, pp. 373, 374; Bahrr-ul-Rayek, Vol. 3, p. 169;
Fatawa-i-Alamgiri, Vol. 2, p. 31.*

ARTICLE 99.

(مادة ٩٩) — ولا بد في صفة خطها من الرضاء حتى لو كانت مكروهة لم يصح -
 [البعز الرائق جلد ثالث - كتاب النكاح صفحة ١٦١]
 فاذا ماتت منه فلورثتها دعوى مهرها — [البعز الرائق جلد ثالث كتاب النكاح
 صفحة ١٦٢]

Bahrr-ul-Rayek, Vol. 3, pp. 161, 162.

SECTION VI.

الفصل السادس في ضمان المهر وهلاكه واستهلاكه واستحقاقه

ARTICLE 100.

(مادة ١٠٠) — وصح ضمان الولي مهرها ولو المرأة صغيرة ... بشرط صحته
 فلو في مرض موته وهو وارثه لم يصح ... وان لم يكن المكفول له او عنه وارث الولي
 الكافل صح ... (الضمان) من الثلث — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٨٦]
 وقبول المرأة وغيرها في مجلس الضمان — [رد المحتار جلد ثاني كتاب النكاح
 صفحة ٣٨٧]

Radd-ul-Muhtâr, Vol. 2, pp. 386, 387.

ARTICLE 101.

(مادة ١٠١) — وتطالب ايأ شأئت من زوجها البالغ او الولي الضامن
 (سواء كان وليه او وليها) — فان ادعى رجوع على الزوج ... ان امر الزوج بالكفالة
 و ... انه لو ضمن و ادعى لا يرجع عليه [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٨٧]

Radd-ul-Muhtâr, Vol. 2, p. 387.

ARTICLE 102.

(مادة ١٠٢) — ولا يطالب الاب بمهر ابنه الصغير الفقير ... اذا زوجه امرأة
 الا اذا ضمنه — لا يواخذ ابو الصغير ... الا اذا ضمن ولا رجوع للاب الا اذا شهد على
 الرجوع عند الاداء — فانه لو مات قبل الاداء ترجع المرأة في تركته ويرجع باقي الورثة
 في نصيب الابن لو كفله الاب — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٨٦ — ٣٨٧]
 اذا كان للصغير مال ... فيطالب ابوه بالدفع من مال ابنه الصغير ... لثبوت ولايته
 عليه ... لا من مال نفسه — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٨٧]

Radd-ul-Muhtâr, Vol. 2, pp. 386, 387.

ARTICLE 103.

(مادة ١٠٣) — لو تزوجها على شيء بعينه وملك قبل التسليم أو استحق فإن كان ذلك من ذوات الأمثال رجعت على الزوج بالمثل و إلا بالقيمة — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٣١]

ولو استحق نصف الدار المهورية ان شئت اخذت الباقي ونصف القيمة و ان شئت اخذت كل القيمة فان طلقها قبل الدخول بها فليس لها الا النصف الباقي — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٣١]

Fatawa-i-Alamgiri, Vol. 2, p. 31.

SECTION VII.

الفصل السابع في قضايا المهر

ARTICLE 104.

(مادة ١٠٤) — فان سلمت و وقع الاختلاف في ... العتوة و بعدها لا يحكم بمهر المثل لانها لا تسلمه نفسها الا بعد تعجيل شيء عادة بل يقال لها لابد ان تقري بما تعجلت و الا قضينا عليك بالمتعارف ... فان ادعت قدر مهر مثلها دفعه اليها ... فانه يمنع منها مقدار ما جرت العادة بتعجيله — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٩٣]

Radd-ul-Muhtâr, Vol. 2, p. 393.

ARTICLE 105.

(مادة ١٠٥) — وان اختلفا في المهر ففي اصله (بان ادعى احدهما التسمية و انكروا الآخر ... بعد عجز المدعي عن البرهان) حلف منكر التسمية فان نكل ثبتت و ان حلف يجب مهر المثل ... و ... لا يزداد على ما ادعته المرأة لو هي المدعية للتسمية و لا ينقص عما ادعاه الزوج لو هو المدعي لها — وفي الطلاق قبل الوطء (او الخلوة) حكم منعة المثل — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٩١ - ٣٩٢]

Radd-ul-Muhtâr, Vol. 2, pp. 391, 392.

ARTICLE 106.

(مادة ١٠٦) — و ان اختلفا في قدره حال قيام النكاح (قبل الدخول او بعده او كذا بعد الطلاق و الدخول) — فالقول لمن شهد له مهر المثل يمينه (فيكون القول لها ان كان مهر مثلها كما قالت او اكثر وله ان كان كما قال او اقل) و اي اقام بيعة قبلت سواء شهد مهر المثل له او لها و لا ... و ان كان مهر المثل بينهما تعالفا

وتمازت البيعتان فان حلقتا او برهنا قضى به وان برهن احداهما قبل برهانه ... ان
ايهما نكل لزمه دعوى الآخر ... و اى اقام بيته قبلت ... قضى به — [رد المحتار
جلد ثاني كتاب النكاح صفحہ ۳۹۲]

ولو كان الاختلاف بعد الطلاق قبل الدخول يجب المقة — [فتاوى عالمگیری
جلد ثاني كتاب النكاح صفحہ ۳۴]

Radd-ul-Muhtâr, Vol. 2, p. 392; Fatawa-i-Alamgiri, Vol. 2, p. 34.

ARTICLE 107.

(مادة ۱۰۷) — وموت احدهما كحياتهما في الحكم اعلا وقدراً ... (فان
كان الاختلاف بين الحي وورثة الميت في الاصل ... وجب مهر المثل ... وان كان في
المقدار حكم مهر المثل) وبعد موتهما ففي القدر القول لورثته (فيلزمهم ما اعترفوا به)
وفي الاختلاف في اعلاه القول لمنكر التسمية — (وهم ورثة الزوج) — لم يقض بشيء
ما لم يبرهن (ورثة الزوجة) — [رد المحتار جلد ثاني كتاب النكاح صفحہ ۳۹۳]
ولو اتفقت الورثة على عدم تسمية المهر في العقد يقضى بمهر المثل — [فتاوى
عالمگیری جلد ثاني كتاب النكاح صفحہ ۳۵]

Radd-ul-Muhtâr, Vol. 2, p. 393; Fatawa-i-Alamgiri, Vol. 2, p. 35.

ARTICLE 108.

(مادة ۱۰۸) — وهذا ... اذا لم تسلم نفسها فان سلمت ووقع الاختلاف في العالين
الحيوة وبعدها ... ادعى الزوج اتصال شيء اليها ... وقد جرت العادة انها لا تسلم نفسها
الا بعد قبض شيء من المهر ... يقال لها تقري بما تعجلت ... والا قضى عليها ...
بالمعارف ... ان حصل اتفاق على قدر المسمى يدفع لها الباقي منه والا فان انكر ورثة
الزوج اصل التسمية فلها بقية مهر المثل وان انكروا القدر فالقول لمن شهد له مهر
المثل وبعد موتهما القول في قدره لورثة الزوج — [رد المحتار جلد ثاني كتاب النكاح صفحہ
۳۹۳ - ۳۹۴]

Radd-ul-Muhtâr, Vol. 2, pp. 393, 394.

ARTICLE 109.

(مادة ۱۰۹) — انفق رجل على معتدة الغير بشرط ان يتزوجها بعد عدتها ... وان
ابت فله الرجوع ان كان دفع لها — (ولا يرجع في ... ما اذا ابت ولم يشترطه او تزوجته)
وان اكلت معه فلا ... يرجع بشيء — [رد المحتار جلد ثاني كتاب النكاح صفحہ
۳۹۵ — ۳۹۶]

Radd-ul-Muhtâr, Vol. 2, pp. 395, 396.

ARTICLE 110.

(مادة ١١٠) — خطب بنت رجل وبعث اليها اشياء ولم يزوجه ابوها فما بعث للمهر يسترد عينه قائما ... وان تغير بالاستعمال او قيمته هالكا ... و ... يسترد ما بعث هدية وهو قائم دون الهالك والمستهلك — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٩٥]

Radd-ul-Muhtâr, Vol. 2, p. 395.

ARTICLE 111.

(مادة ١١١) — ولو بعث الى امرأته شيئا ... من النقدين او العروص او ما يوكل قبل الزفاف او بعد ما بني بها ... ولم يذكر المهر ولا غيره ... عذد الدفع ... ثم قال انه من المهر ... فقالت هو ... هدية ... فالقول له يمينه ... فان حلف و المبعوث قائم فلها ان تردده و ترجع بباقي المهر او كله ان لم يكن دفع لها شيئا منه ... وان هناك وقد بقي لخدمها شيء رجع به — اذا اقام كل منهما بينة تقدم بينها — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٩٤]

Radd-ul-Muhtâr, Vol. 2, p. 394.

SECTION VIII.

الفصل الثامن في جهاز ومتاع البيت والمنازل التي تقع بشأنهما

ARTICLE 112.

(مادة ١١٢) — لو زفت اليه بلا جهاز يليق به فله مطالبة الاب بالنقد ... الا اذا سكت طويلا فلا خصومة له ... الصحيح انه لا يرجع على الاب بشيء لان المال في النكاح غير مقصود ... لكن من المعلوم عادة ان كثرة لاجل كثرة الجهاز — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٩٨ - ٣٩٩]

Radd-ul-Muhtâr, Vol. 2, pp. 398, 399.

ARTICLE 113.

(مادة ١١٣) — جهاز ابنته بجهاز و سلمها ذلك ليس له الاسترداد منها ولا لورثته بعده ان سلمها ذلك في صحته ... لو سلمها في مرض موته فانه تمايز للوارث ولا يصح بدون اجازة الورثة — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣٩٦ - ٣٩٧]

Radd-ul-Muhtâr, Vol. 2, pp. 396, 397.

ARTICLE 114.

(مادة ١٢٤) — وكذا لو اشتراها لها في صغرها ... ان سلمها في مرضه او لم يسلمها اصلاً ... ملكته بشراء الأب لها قبل التسليم ... فلا يجعل له اخذه بهذا الاقرار ... ولو مات قبل دفع الثمن رجع البائع على تركته ولا رجوع للورثة عليها — [رد المحتار جلد ثاني كتاب النكاح صفحہ ٣٩٧]

Radd-ul-Muhtâr, Vol. 2, p. 397.

ARTICLE 115.

(مادة ١١٥) — المهر في حالة البقاء حقها — [البحر الرائق جلد ثالث كتاب النكاح صفحہ ١٦١]

Bahr-ul-Rayek, Vol. 3, p. 161.

ARTICLE 116.

(مادة ١١٦) — و قد رأينا من يأمرها بفرش امتعتها له و لاضيفه جبراً عليها و ذلك حرام — الجهاز ملك المرأة ... ولا يختص بشيء منه ... وينتفع به بانها [رد المحتار جلد ثاني كتاب النكاح صفحہ ٧٠٧ - ٧٠٨]

Radd-ul-Muhtâr, Vol. 2, pp. 707, 708.

ARTICLE 117.

(مادة ١١٧) — جهز ابنته ثم ادعى ان ما دفعه لها عارية وقالت هو تمليك او قال الزوج ذلك بعد موته ليرث منه و قال الأب او ورثته بعد موته عارية ... فالقول للزوج ولها اذا كان العرف مستمرا ان الأب يدفع مثله جهازا لا عارية و ... ان مشتركا ... فالقول للأب كما لو كان اكثر مما يجهز به مثلاً و الأم كالأب في تجهيزها — [رد المحتار جلد ثاني كتاب النكاح صفحہ ٣٩٧ - ٣٩٨] — التجهيز ... يشترط فيه التسليم — [البحر الرائق - جلد ثالث - كتاب النكاح صفحہ ٢٠٠]

Radd-ul-Muhtâr, Vol. 2, pp. 397, 398; Bahr-ul-Rayek, Vol. 3, p. 200.

ARTICLE 118.

(مادة ١١٨) — اذا اختلف الزوجان في متاع موضوع في البيت الذي كانا يسكنان فيه ... (لها او لاهدهما) — [رد المحتار جلد رابع - كتاب الدعوى صفحہ ٤٧٥] و البيت الذي يسكنان فيه ملك الزوج او ملك المرأة — [فتاوى قاضيان - جلد اول - كتاب النكاح صفحہ ١٨٢] — حال قيام النكاح او بعد ما وقعت الفقرة ... فما يكون للنساء عادة ... فهو للمرأة الا ان يقيم الزوج البينة ... و ما يكون للرجال ... فهو للرجل الا ان يقيم المرأة البينة [فتاوى قاضيان جلد اول كتاب النكاح صفحہ ١٨٢] — و ما كان

من متاع التجارة والرجل معروف بذلك فهو للرجل -- [فتاوى عالمگیری جلد ثاني كتاب النكاح - صفحة ٣٩] — اذا كانت المرأة تباع ثياب الرجال وما يصلح للنساء ... فهو للمرأة - [رد المحتار جلد رابع كتاب الدعوى صفحة ١٧٦]

Radd-ul-Muhtâr, Vol. 4, pp. 475, 476 ; Fatawa-i-Kazi Khan, Vol. 1, p. 182 ; Fatawa-i-Alamgiri, Vol. 2, p. 39.

ARTICLE 119.

(مادة ١١٩) — وان مات احدهما و اختلف وارثه مع الحي في المشكل الصالح لهما فالقول فيه للحي — [رد المحتار جلد رابع كتاب الدعوى صفحة ١٧٦]
Radd-ul-Muhtâr, Vol. 4, p. 476.

CHAPTER VIII.

الباب الثامن في نكاح الكتابيات وحكم الزوجية بعد اسلام الزوجين او احدهما

SECTION I.

الفصل الاول في نكاح المسلم الكتابيات

ARTICLE 120.

(مادة ١٢٠) — وصح نكاح كفاية وان كره — اطلقه فشمّل العربية والذمية ... وان اعتقدوا المسيح إلهاً ... و ... من اعتقد ديناً سماوياً و له كتاب منزل كزبور داود فهو من اهل الكتاب فتجوز مناهكتهم — [رد المحتار جلد ثاني كتاب النكاح صفحة ٣١٣] — صح نكاح مسلم ذمية (كتابية) — عند زميين و لم يظهر بهما ان جحد فان شهادة الكافر على المسلم لا تقبل — [شرح الوقاية جلد ثاني كتاب النكاح صفحة ١٠]
Radd-ul-Muhtâr, Vol. 2, p. 313 ; Sharh-i-Vikaya, Vol. 2, p. 10.

ARTICLE 121.

(مادة ١٢١) — ويجوز نكاح الكتابية على المسلمة و المسلمة على الكتابية وهما في القدم سواء — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ١٠]
Fatawa-i-Alamgiri, Vol. 2, p. 10.

ARTICLE 122.

(مادة ١٢٢) — ولا يجوز تزوج المسلمة من مشرك ولا كتابي — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ١٠]
Fatawa-i-Alamgiri, Vol. 2, p. 10.

ARTICLE 123.

(مادة ١٢٣) — و ان تزوج يهودية فتنصرت او نصرانية فذهودت لا يفسد نكاحها — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ١٠]
Fatawa-i-Alamgiri, Vol. 2, p. 10.

ARTICLE 124.

(مادة ١٢٤) — والولد يتبع خير الابوين دينا — [ردالمحتار جلد ثاني كتاب النكاح صفحہ ١٢٧]
Radd-ul-Muhtâr, Vol. 2, p. 427.

ARTICLE 125.

(مادة ١٢٥) — ما يحرم به من الميراث ... اخلاف الدينيين حتى لا يرث الكافر من المسلم ولا المسلم من الكافر. — [البحر الرائق جلد ثامن كتاب الفرائض صفحہ ٥٥٧]
 و انما لم يتوارثا لمانع الكفر — [ردالمحتار جلد ثاني كتاب النكاح صفحہ ١٢١]

Bahrr-ul-Rayek, Vol 8, p. 557 ; Radd-ul-Muhtâr, Vol. 2, p. 421.

SECTION II.

الفصل الثاني في حكم الزوجية بعد اسلام الزوجين او احدهما

ARTICLES 126 & 127.

(مادة ١٢٦ - ١٢٧) — و اذا اسلم احد الزوجين المجوسيين ... (والمواد بالمجوسي من ليس له كتاب مساوي) او امرأة الكذابي — (اما اذا اسلم زوج الكذابية فان النكاح يبقي) — عرض الاسلام على الآخر فان اسلم فيها — (اي فقد اتصف بالصفة الحسنة التي يبقي معها النكاح — طعطاي - جلد ثاني كتاب النكاح صفحہ ٨٢)
 ولو كانا اي المتزوجان اللذان اسلما معمرين او اسلم احد المعمرين ... فرق بينهما — [ردالمحتار جلد ثاني كتاب النكاح صفحہ ١٢٩ - ١٣٠]

والا بان ابى ... فرق بينهما ولو كان الزوج صبيا مميزا ... والمعتوه كالصبي العاقل ... وينتظر عقل اى تمييز غير المميز ولو كان معجزونا لا ينتظر ... بل يعرض الاسلام على ابويه فايهما اسلم تبعه فيبقى النكاح ... و ان ابى فرق بينهما ... وليس المراد من عرض الاسلام ... ان يعرض عليه بطريق الالزام — فان لم يكن له اب ... (اراد بالاب ما يشمل الام ايضا — طعطاي جلد ثاني كتاب النكاح صفحہ ٨٢)

نصب القاضي عنه وصيا فيقضى عليه بالفرقة — [رد المحتار جلد ثاني كتاب
النكاح صفحہ ۴۲۱]

و التفريق بينهما طلاق ... (المراد بالطلاق حقيقته لا الفسخ) — لو ابى لا لو
ابت ... بل الذي يكون من المرأة ... هو الفسخ ... و اباء المميز واحد ابوى المجنون
طلاق — [رد المحتار جلد ثاني كتاب النكاح صفحہ ۴۲۲]

(قوله فارق بينهما) و ما لم يفرق القاضي فهي زوجته — [رد المحتار جلد ثاني
كتاب النكاح صفحہ ۴۲۱]

Tahtavi, Vol. 2, p. 82 ; Radd-ul-Muhtâr, Vol. 2, pp. 419, 420, 421, 422.

ARTICLE 128.

(مادة ۱۲۸) — اسلم المتزوجان ... اقرا عليه ... و لو كانا ... محرمين ... او
قرنما الينا و هما على الكفر فرق القاضي او الذي حكمه بينهما ... و ... لو ... تزوج كذاية
في عدة مسلم ... يفرق من غير مراعاة — [رد المحتار جلد ثاني كتاب النكاح
صفحہ ۴۱۹ - ۴۲۰]

Radd-ul-Muhtâr, Vol. 2, pp. 419, 420.

ARTICLE 129.

(مادة ۱۲۹) — و الولد يتبع خير الابوين ديناً — هذا يتصور ... بان كانا
كافرين فاسلم او اسلمت ثم جائت بولد قبل العرض على الآخر ... او بعدة ...
او كان بينهما ولد صغير قبل اسلام احدهما فانه باسلام احدهما يصير الولد مسلماً —
[رد المحتار جلد ثاني كتاب النكاح صفحہ ۴۲۷]

و الولد يتبع خير الابوين ديناً ... هذا اذا لم يخلف الدار بان كانا في دار
الاسلام او في دار العرب او كان الصغير في دار الاسلام و اسلم الوالد في دار العرب
... و اما اذا كان الولد في دار العرب و الوالد في دار الاسلام فاسلم لا يتبعه ولده و لا يكون
مسلماً — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ۴۶]

Radd-ul-Muhtâr, Vol. 2, p. 427 ; Fatawa-i-Alamgiri, Vol. 2, p. 46.

ARTICLE 130.

(مادة ۱۳۰) — الولد لا يصير مسلماً باسلام جده و لو ابوه ميلاً ... و ... الصغير
تبع ... و ... لا فرق ... بين ان يعقل او لا ... و ... التبعية تنقطع ببلوغه عاقلاً ...
فلو بلغ مجنوناً تبقى التبعية — [رد المحتار جلد ثاني كتاب النكاح صفحہ ۴۲۷]
انها اذا بلغت معتومة بقيت تابعة ... في الدين — [فتاوى عالمگیری جلد ثاني
كتاب النكاح صفحہ ۴۶]

Radd-ul-Muhtâr, Vol. 2, p. 427 ; Fatawa-i-Alamgiri, Vol. 2, p. 46.

CHAPTER IX.

الباب التاسع في النكاح الغير الصحيح والموقوف

SECTION I.

الفصل الاول في النكاح الغير الصحيح

ARTICLE 131.

(مادة ١٣١) — فصل في المحرمات — شروع في بيان شرط النكاح فان هذه كون المرأة محللة — اسباب التحريم انواع — قرابة — مصاهرة — رضاع — الخ — [طعطاوي جلد ثاني كتاب النكاح صفحة ١٣]

حرمة النكاح على نوعين مؤبدة وغير مؤبدة فالمؤبدة تثبت بالنسب والرضاع والصهرية — [فتاوى قاضيخان جلد اول كتاب النكاح صفحة ١٦٥]

Tahtavi, Vol. 2, p. 13; Fatawa-i-Kazi Khan, Vol. 1, p. 165.

ARTICLE 132.

(مادة ١٣٢) — ولا يجوز نكاح منكوحة الغير ومعددة الغير ... ولو تزوج بمنكوحة الغير وهو لا يعلم انها منكوحة الغير فوطئها تجب العدة وان كان يعلم انها منكوحة الغير فوطئها لا تجب العدة حتى لا يحرم على الزوج وطئها — [فتاوى قاضي خان جلد اول كتاب النكاح صفحة ١٦٧ - ١٦٨]

Fatawa-i-Kazi Khan, Vol. I., pp. 167, 168.

ARTICLE 133.

(مادة ١٣٣) — وحرم على المرأة ... الجمع بين الاختين نكاحا وعدة — [شرح الوقايع جلد ثاني كتاب النكاح صفحة ١٠ - ١٢]

وان تزوجهما اي الاختين معا ... او بعقدتين ونسي النكاح الاول — (فلو علم فهو الصحيح والثاني باطل وله طاع الاولى الا ان يطأ الثانية فتعزم الاولى الى انقضاء عدة الثانية) — فرق القاضي بينه وبينهما — (يعنى يقدرى عليه ان يفارقهما فان لم يفارقهما وجب على القاضي ... ان يفرق بينه وبينهما ... فان وقع التفريق قبل الدخول فله ان يتزوج ايتهما شاء للحل) ولهما نصف المهر — (اما في مسئلة تزوجهما معا في عقد واحد ... اذا كان التفريق قبل الدخول فلا مهر لهما) ان كان مهرهما متساويين قدرا وجنسا وهو مسمى — (الضمير راجع الى المهرين بقاويل المذكور) — في العقد وكانت الفرقة قبل الدخول وادعى كل منهما انها الاولى ولا بينة لهما ... (فلو اقامت ادعاهما

البينة على السبق فنكاحها هو الصحيح والثاني باطل) فان اختلفا مهرهما ... (وهو صادق باختلافهما قدرا فقط ... وجنسا فقط) ... يقضى لهما بالانكاح من نصف المهرين المجهين ... وان لم يكن مسمى فالواجب متعة واحدة لهما ... وان كانت الفرقة بعد الدخول وجب لكل واحدة مهر كامل — [رد المحتار جلد ثاني كتاب النكاح صفحہ ۳۰۹ - ۳۱۰ - ۳۱۱] — اذا تزوج امرأتين بعقد واحد واحداهما محرمة عليه صح نكاح الاخرى — [شرح الوقاية جلد ثاني كتاب النكاح صفحہ ۱۷]

Radd-ul-Muhtâr, Vol. 2, pp. 309, 310, 311 ; Sharh-i-Vikaya, Vol. 2, pp. 10, 12, 17.

ARTICLE 134.

(مادة ۱۳۴) — لا يعمل للرجل ان يتزوج حرة طلقها ثلاثا قبل اصابة الزوج الثاني — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ۱۱] لا يجوز نكاح المجوسيات — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ۱۰]

لا يعمل للرجل ان يجمع بين اثني من اربع نسوة — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ۷]

لا (اي لا يجوز) نكاح ... خامسة في عدة الرابعة — [شرح الوقاية جلد ثاني كتاب النكاح صفحہ ۱۸]

ومنها الشهادة ... انها شرط جواز النكاح ... ويشترط العدن فلا ينعقد النكاح بشاهد واحد — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحہ ۱] و... في نكاح فاسد وهو الذي فقد شرطا من شرائط الصحة كشهود — ومثله ... نكاح المعقدة والغامسة في عدة الرابعة ... و... يفرق بين فاسده وباطله في عدة ... و... لا فرق بينهما في غير العدة ... يثبت لكل واحد منهما فساده ولو بغير محضر من صاحبه دخل بها او لا ... فيجب على القاضي — (اي ان لم يتفرقا) التفريق بينهما — [رد المحتار جلد ثاني كتاب النكاح صفحہ ۳۷۹ - ۳۸۰ - ۳۸۱]

Fatawa-i-Alamgiri, Vol. 2, pp. 1, 7, 10, 11 ; Sharh-i-Vikaya, Vol. 2, p. 18 ; Radd-ul-Muhtâr, Vol. 2, pp. 379, 380, 381.

ARTICLE 135.

(مادة ۱۳۵) — و... في نكاح فاسد ... و... يفرق بين فاسده وباطله في العدة ... و... لا فرق بينهما في غير العدة ... يثبت النسب — اما الارث فلا يثبت فيه — [رد المحتار جلد ثاني كتاب النكاح صفحہ ۳۷۹ - ۳۸۰ - ۳۸۱]

ويثبت حرمة المصاهرة بالنكاح الصحيح دون الفاسد ... فلو تزوجها نكاحا فاسدا لا تعزم عليه امها بمجرد العقد بل بالوطع ... وكما تثبت هذه الحرمة بالوطع تثبت

بالمس والتقبيل والظفر الى الفرج بشهوة — [فتاوى عالمگیری جلد ثاني كتاب النكاح
صفحة ٥]

Radd-ul-Muhtâr, Vol. 2, pp. 379, 380, 381; Fatawa-i-Alamgiri, Vol. 2, p. 5.

ARTICLE 136.

(مادة ١٣٦) — و اذا اجتمع ... للصغيرة وليان مستويان ... فان زوجها
على التعاقب جاز الاول دون الثاني وان زوجها كل واحد منها من رجل آخر فوقع
معا او لا يعلم ايها اول بطل العقدان — [فتاوى عالمگیری جلد ثاني كتاب
النكاح صفحة ١٢]

Fatawa-i-Alamgiri, Vol. 2, p. 12.

ARTICLE 137.

(مادة — ١٣٧) و لو زوجها لنفسه فسكوتها رد بعد العقد لا قبله ... و ... لو ...
بلغها فودت ثم قالت رضيت لم يجز — | رد المحتار جلد ثاني كتاب النكاح
صفحة ٣٢٥]

الولي لو تزوجها ... بغير اذنها فبلغها فسكت لا يكون رضی لانه كان اميلا في نفسه
فضوليا في جانب المرأة فلم يتم العقد ... فلا يعمل الرضا ... والحاصل ان الفضولي
ولو من جانب اذا تولى طرفي العقد لا يتوقف عقده على الاجازة ... بل يقع باطلا —
[رد المحتار جلد ثاني كتاب النكاح صفحة ٣٢٥ — فتاوى عالمگیری جلد ثاني كتاب النكاح
صفحة ١١٤ - ١١٥]

Radd-ul-Muhtâr, Vol. 2, p. 325; Fatawa-i-Alamgiri, Vol. 2, pp. 14, 15.

SECTION II.

الفصل الثاني في النكاح الموقوف

ARTICLE 138.

(مادة ١٣٨) — و من عقد عقدا يدور بين نفع و ضرر ... من هؤلاء المحجورين
وهو يعقله ... اجاز وليه اورد — اي ان لم يكن فيه غبن فاحش فان كان لا يصح
و ان اجازة الولي — [رد المحتار جلد خامس كتاب الجهر صفحة ٩٩]
توقف عقد الصبي العاقل ... على اجازة الولي — [البحر الرائق جلد ثالث كتاب
النكاح صفحة ٨٣]

Radd-ul-Muhtâr, Vol. 5, p. 99; Bahrr-ul-Rayek, Vol. 3, p. 83.

ARTICLE 139.

(مادة ١٣٩) — وان زوج الصغير او الصغيرة ابعد الاولياء فان كان الاقرب حاضراً
وهو من اهل الولاية توقف نكاح الابدع على اجازته — [فتاوى عالمگیری جلد ثاني كتاب
النكاح صفحه ١٢]

Fatawa-i-Alamgiri, Vol. 2, p. 12.

ARTICLE 140.

(مادة ١٤٠) — الوكيل بتزويج امرأة (منكورة) — رد المختار جلد ثاني
كتاب النكاح صفحه ٣٥٢)

ليس مخالفاً لو زوجه عمياء او شوهاء فوهاء لها لعب سائل وعقل زائل وشق مائل
او شلاء او رتقاء — [البحر الرائق جلد ثالث كتاب النكاح صفحه ١٥١]

و لو زوجه بنته الصغيرة او موليته ... الصغيرة لم يجز — [رد المختار
جلد ثاني كتاب النكاح صفحه ٣٥٢]

كل عقد صدر من الفضولي وله صيغ انعقد موقوفاً على الاجازة — [البحر الرائق
جلد ثالث كتاب النكاح صفحه ١٤٧]

ولو زوجه المأمور بنكاح امرأة امرأتين في عقد واحد لا ينفذ ... (لانه لا وجه الى
تنفيذهما ... ولا الى التنفيذ في احدهما) وله ان يجيزهما او احدهما ولو في
عقدين لزم الاول و توقف الثاني — [رد المختار جلد ثاني كتاب النكاح صفحه
٣٥٢ - ٣٥٣]

Bahr-ul-Rayek, Vol. 3, pp. 147, 151; Radd-ul-Muhtâr, Vol. 2, pp. 352, 353.

ARTICLE 141.

(مادة ١٤١) — و ... لم يجز ... لو امرأة بمعينة ... بخالف — [رد المختار
جلد ثاني كتاب النكاح صفحه ٣٥٢]

ولو وكل رجلاً بان يزوجه فلانة بالف درهم فزوجها اياه بالعين ان اجاز الزوج جاز
وان رد بطل وان لم يعلم الزوج بذلك حتى دخل بها فالخيار باق ... وان لم يرض
الزوج بالزيادة فقال الوكيل انا اعوم الزيادة و الزمكها النكاح لم يكن له ذلك —
[فتاوى عالمگیری جلد ثاني كتاب النكاح - صفحه ١٩]

Radd-ul-Muhtâr, Vol. 2, p. 352; Fatawa-i-Alamgiri, Vol. 2, p. 19.

ARTICLE 142.

(مادة ١٤٢) — لو وكلته بتزويجها من رجل (لا يملك ان يزوجه من نفسه —
فتاوى عالمگیری جلد ثاني كتاب النكاح صفحه ١٨)

و كذا لزوجها من ابنة او ابنه — [رد المحتار جلد ثاني كتاب النكاح
صفحة ٣٥٥]

امرتة بتزويجها و لم تعين فزوجها غير كفؤ لم يعز ... فلو كان كفؤا الا انه ادعى
او مقعد او صبي او معقورة فهو جائز و كذا لو كان ... عنيانا — [رد المحتار جلد ثاني
كتاب النكاح صفحة ٣٥٢]

Fatawa-i-Alamgiri, Vol. 2, p. 18 ; Radd-ul-Muhtâr, Vol. 2, pp. 352, 355.

ARTICLE 143.

(مادة ١٤٣) — لو انتسب الزوج لها نسباً غير نسبه فان ظهر دونه وهو ليس
بكفؤ فعق الفسخ ثابت للكل و ... يقال ان هذا الخيار ترتب على الغرر — [طحطاوي
جلد ثاني كتاب النكاح صفحة ١٤١ - ١٤٢]

Tahtavi, Vol. 2, pp. 41, 42.

ARTICLE 144.

(مادة ١٤٤) — كل عقد صدر من الفضولي (بغير ولاية و لا وكالة —
رد المحتار جلد ثاني كتاب النكاح صفحة ٣٥٢)

انعقد موقوفاً — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٢٠]

Radd-ul-Muhtâr, Vol. 2, p. 354 ; Fatawa-i-Alamgiri, Vol. 2, p. 20.

CHAPTER X.

الباب العاشر في اثبات النكاح والاقاربه

ARTICLE 145.

(مادة ١٤٥) — ولا ينعقد نكاح المسلمين الا بحضور شاهدين حرين عاقلين
بالغين مسلمين رجلين او رجل و امرأتين عدولا كانوا او غير عدول او محدودين
في القذف ... ولا تشترط العدالة حتى ينعقد بحضور الفاسقين عدنا خلافا للشافعي رح
له ان الشهادة من باب الكرامة و الفاسق من اهل الاهانة و لنا انه من اهل الولاية
فيكون من اهل الشهادة و هذا لان لما لم يحرم الولاية على نفسه لاسلامه لا يحرم على
غيره لانه من جنسه و لانه صالح مقلداً فيصالح مقلدا و كذا شاعدا — [هداية جلد ثاني
كتاب النكاح صفحة ١٢٨٦]

Hidaya, Vol. 2, p. 286.

ARTICLE 146.

(مادة ١٤٦) — قوله و ان لم يثبت النكاح بهما ... (اي بالابنين اي بشهادتهما)
ان ادعى القريب كما صح نكاح مسلم ذمية عند ذميين ... قوله ان ادعى القريب ... اي

لو كانا ابنيه وحده او ابنيها وحدها فادعى احدهما النكاح وجعله الآخر لا تقبل شهادة اني المدعي له بل نقبل عليه و لو كانا ابنيهما لا تقبل شهادتهما للمدعي ولا عليه لانها لا تغلو عن شهادتهما لاصلهما وكذا لو كان احدهما ابنا والآخر ابنة لا تقبل اصلا كما في البحر — [رد المحتار جلد ثاني كتاب النكاح صفحه ٢٩٦]

Radd-ul-Muhtâr, Vol. 2, p. 296.

ARTICLE 147.

(مادة ١٤٧) — ولو اقر ولي صغير او صغيرة او اقر وكيل رجل او امرأة او مولى العبد بالنكاح لم ينفذ لانه اقرار على الغير بخلاف مولى الامة حيث ينفذ اجماعا لان منافع بعضها ملكه - الا ان يشهد الشهود على النكاح — بان ينصب القاضي خصما عن الصغير حتى يذكر فتقام البينة عليه او يدرك الصغير او الصغيرة فيصدق - اى الولي المقر او يصدن المؤكل او العبد — [طحطاوي جلد ثاني كتاب النكاح صفحه ١٤١]

Tahtavi, Vol. 2, p. 41.

ARTICLE 148.

(مادة ١٤٨) — وصح (اقراره) بالزوجة بشرط خلوعها من زوج و عدته — [الدر المختار جلد ثالث كتاب الاقرار صفحه ٨٧]

Durrul-Mukhtar, Vol. 3, p. 87.

BOOK II.

الكتاب الثاني فيما يجب لكل من الزوجين
على صاحبه

CHAPTER I.

الباب الاول فيما يجب على الزوج من حسن المعاملة للزوجة

ARTICLE 150.

(مادة ١٥٠) — ان من احكام النكاح المعاشرة بالمعروف — [البعراالرائق اجد
ثالث كتاب النكاح صفحة ٢٣٦]

النفقة ... هي الطعام والكسوة والسكني ... ونفقة الغير تجب على الغير ...
بزوجية — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٩٨]
Bahrr-ul-Rayek, Vol. 3, p. 236 ; Radd-ul-Muhtâr, Vol. 2, p. 698.

ARTICLE 151.

(مادة ١٥١) — ويسقط حقها ببرة في القضاء — [ردالمحتار جلد ثاني كتاب
النكاح صفحة ٤٣٢]
Radd-ul-Muhtâr, Vol. 2, p. 432.

ARTICLE 152.

(مادة ١٥٢) — و اذا كان للرجل امرأتان حرتان فعليه ان يعدل بينهما ... في ...
عدم الجور ... في النفقة — [ردالمحتار جلد ثاني كتاب النكاح صفحة ٤٣١]
ومما يجب على الأزواج للنساء العدل والتسوية بينهما فيما يملكه والبيتوتة
والموانسة — [رد المحتار جلد ثاني كتاب النكاح صفحة ٤٣١]
Radd-ul-Muhtâr, Vol. 2, p. 431.

ARTICLE 153.

(مادة ١٥٣) — يجب ... ان يعدل ... بالتسوية ... بالفرق بين ... مريضة
وصحيحة و حائض وذات نفاس ... ورتقاء وقرناء ... والبكرو الثيب والجديدة
والقديمة والمسلمة والكتابية سواء — [رد المحتار جلد ثاني كتاب النكاح صفحة ٤٣٠ -
٤٣١ - ٤٣٢ - ٤٣٣ - ٤٣٤]
Radd-ul-Muhtâr, Vol. 2, pp. 430, 431, 432, 433, 434.

ARTICLE 154.

(مادة ١٥٤) — و يقيم عند كل واحدة منهن يوما وليلة ... و ان شاء ... ثلاثة او سبعة ... و الوأى في البداية في القسم اليه و كذا في مقدار الدور — [رد المحتار جلد ثاني كتاب النكاح صفحة ٤٣٥]

انما تلزمه التسوية في الليل ... وليس ... ان يضبط زمان النهار ... بل ذلك في البيوتة — [رد المحتار جلد ثاني كتاب النكاح صفحة ٤٣٥]

لو كان عمله ليلا ... ذكر ... انه يقسم نهارا — [رد المحتار جلد ثاني كتاب النكاح صفحة ٤٣٥]

Radd-ul-Muhtâr, Vol. 2, p. 435.

ARTICLE 155.

(مادة ١٥٥) — و لا يقيم عند احدهما اكثر الا باذن الاخرى — [رد المحتار جلد ثاني كتاب النكاح صفحة ٤٣٥] و ... لا يدخل عليها الا لعبادتها و لو اشتد ... لا بأس ان يقيم عندها حتى تشفي — [رد المحتار جلد ثاني كتاب النكاح صفحة ٤٣٥]

Radd-ul-Muhtâr, Vol. 2, p. 435.

ARTICLE 156.

(مادة ١٥٦) — و لو تركت ... نوبتها لضررتها صح ولها الرجوع في ذلك في المستقبل — [رد المحتار جلد ثاني كتاب النكاح صفحة ٤٣٤]

Radd-ul-Muhtâr, Vol. 2, p. 434.

ARTICLE 157.

(مادة ١٥٧) — و لا قسم في السفر ... فله السفر بمن شاء منهن و القرعة احب — [رد المحتار جلد ثاني كتاب النكاح صفحة ٤٣٤]

و اذا قدم من السفر ليس للآخرى ان تطلب من الزوج ان يسكن عندها مثل ما كان عند التي سافرها — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٤٧]

Radd-ul-Muhtâr, Vol. 2, p. 434 ; Fatawa-i-Alamgiri, Vol. 2, p. 47.

ARTICLE 158.

(مادة ١٥٨) — و لو مرض هو في بيته دعا كلا في نوبتها — هذا اذا كان له بيت ليس فيه واحدة منهن و الا فان لم يقدر على التحول الى بيت الاخرى يقيم بعد الصحة عند الاخرى بقدر ما اقام عند الاولى مريضا — [رد المحتار جلد ثاني كتاب النكاح صفحة ٤٣٤]

Radd-ul-Muhtâr, Vol. 2, p. 435.

ARTICLE 159.

(مادة ١٥٩) — ولو اقام عند واحدة شهرا في غير سفر ثم اخاصته الاخرى ... يومر بالعدل بينهما في المستقبل ... وان عاد الى الجور بعد نهي القاضي اياه عزز بغير حبس — بل يوجعه عقوبة — [ردالمحتار جلد ثاني كتاب النكاح صفحة ٤٣٣ - ٤٣٤]

Radd-ul-Muhtâr, Vol. 2, pp. 433. 434.

CHAPTER II.

الباب الثاني في النفقة الواجبة على الزوج للمرأة

SECTION I.

الفصل الاول في بيان من تستحق النفقة من الزوجات

ARTICLE 160.

(مادة ١٦٠) — تجب للزوجة بنكاح صحيح ... على زوجها ... و لو صغيرا ... لا يقدر على الوطئ ... دخل في هذا ... العنين والمريض ... او فقيرا ولو كانت مسلمة او كافرة او كبيرة او صغيرة تطيق الوطئ او تشتهي للوطئ ... فقيرة وغنية — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٩٩ - ٧٠٠]

Radd-ul-Muhtâr, Vol. 2, pp. 699, 700.

ARTICLE 161.

(مادة ١٦١) — تجب النفقة ... وان لم تنقل الى منزل الزوج — اذا لم يطالبها الزوج بالنفقة ... وكذا اذا طالبها ولم تمنع ... بغير حق — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠١]

Radd-ul-Muhtâr, Vol. 2, p. 701.

ARTICLE 162.

(مادة ١٦٢) — تجب للزوجة ... و لو منعت نفسها للهر ... الذي تعرف تقديمه ... سواء كان قبل الدخول او بعده ... او ابت الذهاب اياه او السفر معه — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٩٩ - ٧٠٠ - ٧٠٢]

Radd-ul-Muhtâr, Vol. 2, pp. 699, 700, 702.

ARTICLE 163.

(مادة ١٦٣) — المذهب ... وجوب النفقة للمريضة قبل النقلة وبعدها يمكنه جماعها او لا — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠٣]

ان لها النفقة اذا مرضت بعد النقلة في بيت الزوج او قبل النقلة ثم انتقلت الى بيته او لم تنتقل و لم تمنع نفسها (بغير حق) — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۰۳]

مرضت في بيت الزوج ... فانقلت لدار ايها ان لم يمكن نقلها بمحقة و نحرها فلها النفقة ... وان امكن نقلها الى بيت الزوج بمحقة و نحرها فلم تنتقل لا نفقة لها — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۰۱]

Radd-ul-Muhtâr, Vol. 2, p. 701, 703.

ARTICLE 164.

(ماده ۱۶۴) — لها النفقة ... كحبه مطلقا — اى لو ... حبسته في لدين عليه — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۰۲ - ۷۰۳]
تجب للزوجة على زوجها ... ولو ... فقيرا — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۶۹۹ - ۷۰۰]

Radd-ul-Muhtâr, Vol. 2, pp. 699, 700, 702, 703.

ARTICLE 165.

(ماده ۱۶۵) — وتجب لخدامها المملوك لها ... ملكا تاماً و لا شغل له غير خدمتها ... لو ... موصرا ... و ... يفرض له ما يكفيه بالمعروف ... ولوله اولاد لا يكفيه خادم واحد فرض عليه نفقة لخدامين او اكثر — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۱۰ - ۷۱۱]

غنية زفت اليه بخدم كثير استعقت نفقة الجميع — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۱۱]

Radd-ul-Muhtâr, Vol. 2, pp. 710, 711.

SECTION II.

الفصل الثاني في بيان من لا نفقة لهن من الزوجات

ARTICLE 166.

(ماده ۱۶۶) — صغيرة ... لا نشتهي اصلا و لوللجماع فيمادون الغرج ... فلا نفقة ... ما لم يسكها في بيته للخدمة او الاستيناس — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۰۰]

Radd-ul-Muhtâr, Vol. 2, p. 700.

ARTICLE 167.

(مادة ١٦٧) — ومريضة لم توف — (الى ... زوجها) اى لا يمكنها الانتقال معه اصلا فلا نفقة لها — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠٣]

Radd-ul-Muhtâr, Vol. 2, p. 703.

ARTICLE 168.

(مادة ١٦٨) — وحاجة ... ولو فرضا ... مع غير الزوج لامعه ... لا نفقة السفر ... ولو بمهرم ولو حجت مع الزوج ... فعليه نفقة العسر ... اما لو اخرجها هو يلزمه جميع ذلك — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠٣]

واما اذا حج الزوج معها ... يجب عليه نفقة العسر دون اسفر — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٦٨]

Radd-ul-Muhtâr, Vol. 2, p. 703 ; Fatawa-i-Alamgiri, Vol. 2, p. 168.

ARTICLE 169.

(مادة ١٦٩) — لو تزوج من المحترقات التي تكون بالنهار في مصالحها وبالليل عنده واذا ... منعها من ذلك ... عصته وخرجت ... فلا نفقة لها ... مادامت خارجة — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠٢]

Radd-ul-Muhtâr, Vol. 2, p. 702.

ARTICLE 170.

(مادة ١٧٠) — ومحبوسة ولو ... بدين تقدر على ايفائه اولا ... فلا نفقة ... على الزوج ... الا اذا حبسها هو بدين له — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠٢]

Radd-ul-Muhtâr, Vol. 2, p. 702.

ARTICLE 171.

(مادة ١٧١) — لا نفقة للناشئة ... العاصية على الزوج ... خارجة من بيته بغير حق ... وتسقط ... بالنشوز النفقة المفروضة لا المستدانة ... اى بخلاف ما اذا امرها بالاستدانة فاستدانت عليه فانها لا تسقط ... شمل الخروج الحكى كان كان المنزل ملكا لها فمنعته من الدخول عليها ... ما لم تكن سألته النقلة - لوعادت (الناشئة) ... الى بيت الزوج ... ولو بعد سفره لوعادت الى بيته لا يعود ما سقط ... (بالنشوز) لو مانعته من الوطء (بمنزل الزوج) لم تكن ناشئة في سقوط المفروض — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠١ - ٧٠٢]

Radd-ul-Muhtâr, Vol. 2, pp. 701, 702.

ARTICLE 172.

(مادة ١٧٢) — لا نفقة ... لمكنوحة فاسدا ... و ... موطوءة بشبهة ... وفي ...
النكاح بلا شهود تستحق النفقة ... ولو ... فرض لها القاضي النفقة ... ثم ظهر فساد
النكاح ... و فرق بينهما رجع عليها ... بما اخذته من النفقة ... على زوجها ... ولو انفق
بلا فرض القاضي لم يرجع بشي — [رد المحتار جلد ثاني كتاب الطلاق
صفحة ٦٩٩ - ٧٠١]

Radd-ul-Muhtâr, Vol. 2, pp. 699, 701.

SECTION III.

الفصل الثالث في تقدير نفقة الطعام

ARTICLE 173.

(مادة ١٧٣) — وجوب النفقة ... بقدر حالهما ... نفقة الموهرين اذا كانا
موهرين و ... نفقة المعسرين اذا كانا معسرين ... فان كان موسرا وهي معسرة ... فتجب
نفقة الوسط ... ويخاطب بقدر وسعه و الباقي دين الى الميسرة — [رد المحتار جلد ثاني
كتاب الطلاق صفحة ٧٠٠]

Radd-ul-Muhtâr, Vol. 2, p. 700.

ARTICLE 174.

(مادة ١٧٤) — ويقدرها ... القاضي ... اصنافا او قومها بالدراهم ... بحسب عرف
... سعر البلد ... بقدر الغلاء والرخص ... باعتبار حالهما ... ثم غلا السعر ... تزداد ...
ثم رخص تسقط الزيادة ... للزوج ... و لو بعد القضاء — [رد المحتار جلد ثاني
كتاب الطلاق صفحة ٧٥٧]

Radd-ul-Muhtâr, Vol. 2, p. 757.

ARTICLE 175.

(مادة ١٧٥) — يعتبر في الفرض الاصلح والايسر ففي المحترف يوما بيوم لانه قد
لا يقدر على تحصيل نفقة شهر ... و ... يعطيها معجلا ... كل يوم عند المساء عن اليوم
الذي يلي ذلك المساء ... و ان كان تاجرا فنفقة شهر بشهر او من الدهاقين فنفقة سنة
بسنة او من الصناع الذين لا ينقصي عملهم الا بانقضاء الاسبوع كذلك ... لكن اذا
ماطلها ... و ... لم يدفع لها فاردت ان تطلب كل يوم ... تطلب عند المساء —
[رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٠٥]

Radd-ul-Muhtâr, Vol. 2, p. 705.

ARTICLE 176.

(مادة ١٧٦) — وللزوج الاتفاق عليها بنفسه ... إلا ان يظهر للقاضي عدم اتفاده فيفرض ... لها ... ويأمره لمعطيتها (لنفق على نفسها ...) ان شكت مظه ولم يكن صاحب مائدة ... يمكن المرأة من تناول مقدار كفايتها ... مع حضرتها ... [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠٤ - ٧٠٥]

ولو فرض الحاكم النفقة على الزوج فامتنع من دفعها وهو صومر وطلبت المرأة حبسه له ان يعبسه الا انه لا ينبغي ان يعبسه في اول مرة ... بل يوخر العبس الى مجلسين وثلاثة يغيطه في كل مجلس ... فان لم يدفع حبسه — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٢] ويبيع الحاكم ماله عليه ويصرفه في نفقتها ... ولا يباع ... اصول حوائجه — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠٥]

Radd-ul-Muhtâr, Vol. 2, pp. 704, 705 ; Fatawa-i-Alamgiri, Vol. 2, p. 172.

ARTICLE 177.

(مادة ١٧٧) — واذا كان حال الزوج في العسرة معلوما ... فالقاضي لا يعبسه — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧١] — ولا يفرق بينهما بعجزه عنها ... بل يفرض لها النفقة عليه و يامرهما بالاستدانة ... عليه ... وتجب الادانة على من تجب عليه نفقتها ونفقة الصغار لولا الزوج — لوكان للمعسر اولاد صغار ولم يقدر على اتفاقهم ... تجب الادانة ... على من ... تجب نفقتهم ... لولا الاب — و يعبس ... من تجب عليه ... الادانة ... اذا امتنع — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧١٢ - ٧١٣]

Fatawa-i-Alamgiri, Vol. 2, p. 171 ; Radd-ul-Muhtâr, Vol. 2, pp. 712, 713.

ARTICLE 178.

(مادة ١٧٨) بعد فرض القاضي ... او التراضي على شيء معين ... لها اخذ كفيل ... جبراً ... ضمن ... بنفقة شهر فاكثرو خوفاً من غيبته ... فيؤخذ بقدرها — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠٥ - ٧٠٦]

Radd-ul-Muhtâr, Vol. 2, pp. 705, 706.

ARTICLE 179.

(مادة ١٧٩) — اذا فرض القاضي للمرأة النفقة فعلا الطعام او رخص فان القاضي يغير ذلك الحكم ... تجوز الزيادة ... والنقصان ... بعد ... تقدير النفقة ... بالقضاء ... قضى بنفقة الاعسار ... او ... نفقة اليسار ... ثم ايسر احدهما ... او اعسر ... وجب

الوسط ... لو ايسر ... بعد اعسارها ... تتم الغاضي نفقة يسارة في المستقبل — [ردالمحتار
جلد ثاني كتاب الطلاق صفحة ٧١٣ - ٧١٤]

Radd-ul-Muhtâr, Vol. 2, pp. 713, 714.

ARTICLE 180.

(مادة ١٨٠) — و لا يجوز لها اخذ الاجرة على ... الطحن و الخبز —
[ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠٣]

Radd-ul-Muhtâr, Vol. 2, p. 703.

SECTION IV.

الفصل الرابع في تقدير الكسوة والسكنى

ARTICLE 181.

(مادة ١٨١) — وتفرض لها الكسوة في كل نصف حول مرة ... فيجب ...
ما تدفع به اذى العرو البرد — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠٤ - ٧٠٧]
الكسوة واجبة عليه ... لها ... صيفا و شتاء — [فتاوى عالمگیری جلد ثاني
كتاب الطلاق صفحة ١٧٤]

ويختلف ذلك يسارا واعسارا ... وبلدا — [ردالمحتار جلد ثاني كتاب الطلاق
صفحة ٧٠٧]

Fatawa-i-Alamgiri, Vol. 2, p. 174; Radd-ul-Muhtâr, Vol. 2, pp. 704, 707.

ARTICLE 182.

(مادة ١٨٢) — فان شاء فرضها اصنافا وان شاء قومها وقضى بالقيمة ... و...
تجب ... معجلة — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٠٤]

Radd-ul-Muhtâr, Vol. 2, p. 704.

ARTICLE 183.

(مادة ١٨٣) — بخلاف كسوة المرأة فانها لا يقضى لها باخويل الا اذا تخرقت
قبل مضي المدة بالاستعمال المعتاد — [ردالمحتار جلد ثاني كتاب الطلاق
صفحة ٧١٠]

ولو ضاعت الكسوة ... لم يجدد ... حتى يبضي الفصل — [فتاوى عالمگیری
جلد ثاني كتاب الطلاق صفحة ١٧٤]

Radd-ul-Muhtâr, Vol. 2, p. 710; Fatawa-i-Alamgiri, Vol. 2, p. 174.

ARTICLE 184.

(مادة ١٨٤) — و... تجب لها السكنى ... بقدر حالها ... في اليسار و الاعسار ... ففي ... اليسار لابد من افرادها في دار — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧١٨ - ٧١٩ - ٧٢٠]

و بيت منفرد من دار له ... مرافق ... كفاها ... و... هو في المرأة الوسط ... و ... البيت الذي ليس له جيران ليس بمسكن شرعي — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧١٩ - ٧٢٠]

Radd-ul-Muhtâr, Vol. 2, pp. 718, 719, 720.

ARTICLE 185.

(مادة ١٨٥) — و... تجب له السكنى في بيت خال عن اهله سوى طفله الذي لا يفهم الجماع — (اما الذي يفهم فليس له اسكانه معها — طحاوي جلد ثاني كتاب الطلاق صفحة ٢٦٦)

وامته وام ولده و... له منع ... اهله ... من السكنى معها في بيته ولو ولدها من غيره — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧١٨ - ٧١٩]

Tahtavi, Vol. 2, p. 266 ; Radd-ul-Muhtâr, Vol. 2, pp. 718, 719.

ARTICLE 186.

(مادة ١٨٦) — فان كانت دار فيها بيوت واعطى لها بيتا يغلق ويفتح لم يكن لها ان تطلب بيتا آخر اذا لم يكن ثمة احد من اعماء الزوج يؤذيها ... ولو اراد ان يسكنها مع ضررتها او مع اعمائها ... فابت فعليه ان يسكنها في منزل منفرد — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧١٩]

Radd-ul-Muhtâr, Vol. 2, p. 719.

ARTICLE 187.

(مادة ١٨٧) — ان الافشاء بلزوم المؤنسة وعدمه يختلف باختلاف المساكن ... فان كان كبيرا كالدار الخالية من السكان المرتفعة الجدران يلزم ... فاذا اسكنها في دار و كان يخرج ليلا ليبيت عند ضررتها ... وليس لها ولد او خادم تستأنس به ... فيلزمه اتيانها بمؤنسة او اسكانها في بيت من دار عند من لا يؤذيها — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢٠ - ٧٢١]

Radd-ul-Muhtâr, Vol. 2, pp. 720, 721.

ARTICLE 188.

(مادة ١٨٨) — يجب ... الفرائش واللحاف (و... ما يفترض للقعود عليه فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ١٧٤) — و... لو كان لها امتعة من فرائش ونحوها لا يسقط عن الزوج ذلك — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٧٠٧]

ان ادوات البيت ولي الرجل — [البحر الرائق جلد رابع كتاب الطلاق صفحہ ١٩٤]
ويجب لها ما تنظف به ... على عادة اهل البلد — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ١٧٠]

Fatawa-i-Alamgiri, Vol. 2, pp. 170-174; Radd-ul-Muhtâr, Vol. 2, p. 707; Bahrr-ul-Rayek, Vol. 4, p. 194.

SECTION V.

الفصل الخامس في نفقة زوجة الغائب

ARTICLE 189.

(مادة ١٨٩) — تفرض النفقة ... لزوجة الغائب ... في مال له من جنس حقهم كقبر — (هو غير المضروب من الذهب او منة ومن الفضة) او طعام ... عند او على من يقربه (عند) للامانة و (على) للدين و... الوديعة اولى من الدين في البداءة بالاتفاق منها ... وبالزوجية ... وكذا ... اذا علم قاض بذلك - اى ولم يقربه المديون والمودع ... و... اخذ منها كفيلا بما اخذته ... ويعطفها ... ان الغائب لم يعطها النفقة ولا كانت ناشئة ولا مطلقة مضت عدتها — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٧٢٢ - ٧٢٣]

Radd-ul-Muhtâr, Vol. 2, pp. 722, 723.

ARTICLE 190.

(مادة ١٩٠) — و... ان لم يخلف مالا فاقامت بينة ... يقضي ... بالنفقة ... و... تؤمر بالاستدانة لا ... بالنكاح — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٧٢٤]
Radd-ul-Muhtâr, Vol. 2, p. 724.

ARTICLE 191.

(مادة ١٩١) — اذا رجع الزوج ... و... كان قد عجل (النفقة) و اقام البينة على ذلك اولم تقم له بينة و استعطفها فنكلت فهو بالخيار ان شاء اخذ من المرأة و ان شاء اخذ من الكفيل. ولو اقرت المرأة انها كانت قد عجلت النفقة من الزوج فان

الزوج يأخذ منها لا يأخذ من الكفيل — [فتاوى عالمگیری جلد ثاني كتاب الطلاق
صفحة ١٧٠ - ١٧١]
Fatawa-i-Alamgiri, Vol. 2, pp. 170, 171.

ARTICLE 192.

(مادة ١٩٢) — وان رجع الغائب واذكر النكاح فالقول قوله مع حلفه فإذا حلف
فان كان المال وديعة فله ان يأخذ من ايها شاء ان شاء اخذ من المرأة وان شاء اخذ
من المودع واما في الدين ياخذ من الغريم ثم يرجع الغريم على المرأة — [فتاوى
عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧١]
Fatawa-i-Alamgiri, Vol. 2, p. 171.

ARTICLE 193.

(مادة ١٩٣) — واذا رجع الزوج واقام البينة على الطلاق وانقضاء العدة ضمن
القابض ولا ضمن الدافع الا اذا قال بينة الزوج ان الدافع كان يعلم بالطلاق وانقضاء
العدة — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧١]
Fatawa-i-Alamgiri, Vol. 2, p. 171.

ARTICLE 194.

(مادة ١٩٤) — وبعد ما امر القاضي المديون او المودع اذا قال المودع دفعت
المال اليها لاجل النفقة قبل قوله ولا يقبل قول المديون الا ببينة — [فتاوى عالمگیری
جلد ثاني كتاب الطلاق صفحة ١٧١]
Fatawa-i-Alamgiri, Vol. 2, p. 171.

ARTICLE 195.

(مادة ١٩٥) — واذا كانت البديعة والمال الذي في بيت الزوج من خلاف
جنس حقها فليس لها ان تبيع شيئاً من ذلك في نفقة نفسها وكذلك القاضي لا يبيع ذلك
في نفقتها... وينفق عليها من غلة الدار — [فتاوى عالمگیری جلد ثاني كتاب الطلاق
صفحة ١٧١]
Fatawa-i-Alamgiri, Vol. 2, p. 171.

ARTICLE 196.

(مادة ١٩٦) — في كل موضع كان للقاضي ان يقضي لها بالنفقة في مال الزوج
فليها ان تأخذ من مال الزوج ما يكفيها بالمعروف بغير قضاء — [فتاوى عالمگیری جلد ثاني
كتاب الطلاق صفحة ١٧١]
Fatawa-i-Alamgiri, Vol. 2, p. 171.

SECTION IV.

الفصل السادس في دين النفقة

ARTICLE 197.

(مادة ١٩٧) — وينفق على المحجور وعلى زوجته واولاده الصغار وذوي ارحامه من ماله لان حاجته الاصلية مقدمة على حق الغرماء — [البحر الرائق جلد ثامن باب الحجر صفحہ ٩٥]
Bahrr-ul-Rayek, Vol. 8, p. 95.

ARTICLE 198.

(مادة ١٩٨) — و النفقة لا يصير ديناً الا بالقضاء او الرضاء ... على قدر معين —
 [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٧١٣]
Radd-ul-Muhtâr, Vol. 2, p. 714.

ARTICLE 199.

(مادة ١٩٩) — ان القاضي اذا فرض لها النفقة ... او ... تراضيا على شيء ثم مضت مدة ... لا تسقط ... اذا لم تقبضها ... وبعد القضاء او الرضاء ترجع بما انفقت —
 [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٧١٤ - ٧١٥]
Radd-ul-Muhtâr, Vol. 2, p. 714.

ARTICLE 200.

(مادة ٢٠٠) — لا يلزمه عما ... انفقت ... قبل الفرض بالقضاء او الرضاء ... على شيء ... غاب عنها او كان حاضرا ... بل تسقط بمضي ... شهر او اكثر ... و نفقة مادون الشهر لا تسقط — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٧١٤]
Radd-ul-Muhtâr, Vol. 2, p. 714.

ARTICLE 201.

(مادة ٢٠١) — النفقة ... المفروض ... بالرضاء او القضاء ... والمستدانة ... بلا امر القاضي ... يسقط ... بموت احدهما ... و ... عدم سقوطها بالطلاق ... الا ... لسوء الخلقها — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٧١٤ - ٧١٥]
Radd-ul-Muhtâr, Vol. 2, pp. 714 & 715.

ARTICLE 202.

(مادة ٢٠٢) — و النفقة المستدانة بامر ... القاضي ... لا تسقط — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٧١٥]
Radd-ul-Muhtâr, Vol. 2, p. 715.

ARTICLE 203.

مادة ٢٠٣) — ولا ... تسترد ... النفقة ... المعلقة بموت او طلاق عجلها الزوج او ابوه ولو قائمة — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧١٦]

Radd-ul-Muhtâr, Vol. 2, p. 716.

ARTICLE 204.

(مادة ٢٠٤) — الأبراء قبل الغرض — (بالقضاء او بالرضاء ...) بالحل و بعده يصح مما مضى ومن شهر مستقبل ... (المراد بالمستقبل ما دخل اوله) ... اذا كانت مغروضة بالا شهر فلها بالايام يبدء من نفقة يوم مستقبل ... وكذا لو بالساين يبرأ عن نفقة سنة مستقبلة — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٠٨]

Radd-ul-Muhtâr, Vol. 2, p. 708.

ARTICLE 205.

(مادة ٢٠٥) — دين النفقة ... و ... عليها دين لزوجها لم يلتقيا قعصا الا برضا — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٠٦] — واذا طلبت المرأة من القاضي ان يفرض لها النفقة على زوجها وكان الزوج على المرأة دين فقال احسبوا لها نفقتها ما كان له ذلك — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧١]

Radd-ul-Muhtâr, Vol. 2, p. 706; Fatawa-i-Alamgiri, Vol. 2, p. 171.

CHAPTER III.

الباب الثالث في ولاية الزوج وما له من الحقوق

ARTICLE 206.

(مادة ٢٠٦) — ومنها ولاية تاديبها اذا لم تطعه — [البحر الرائق جلد ثالث كتاب النكاح صفحة ٨٤]

المرأة ليس عليها الا تسليم نفسها في بيته ... وقد رايها من يأمرها بفرض امتعتها له ولا ينفقه جبرا عليها و ذلك حرام — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٠٧]

Bahrr-ul-Rayek, Vol. 3, p. 84; Radd-ul Muhtâr, Vol. 2, p. 707.

ARTICLE 207.

(مادة ٢٠٧) — فان قبضته فلا تخرج الا لحق لها او عليها او لزيارة ابويها كذا جمعة مرة او المعازم كل سنة ... بلا انهاء ريمها من زيارة الاجانب وعياهم والولاية ... ولو كانت عند المعازم — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٢١ و جلد ثاني كتاب النكاح صفحة ٣٩٠]

له منعهم من السكني معها في بيته سوء كان ما كان له او اجارة او عارية — [ردالمحتار
جلد ثاني كتاب الطلاق، صفحة ٧١٩]

Radd-ul-Muhtâr, Vol. 2, pp. 390, 719, 721.

ARTICLE 208.

(مادة ٢٠٨) — و ينقلها فيما دون مدة ... السفر من المصر الى القرية وبالعكس
ومن قرية الى قرية. اذا كان ماصرا عليها بعد اداء ثلثه معجلا ... انه لا يسفر بها جبرا
عليها ... بعد ابقاء المهر — اذا اراد ان يخرجها الى بلاد الغربية يمنع من ذلك —
[ردالمحتار جلد ثاني كتاب النكاح، صفحة ٣٩٠ - ٣٩١]

Radd-ul-Muhtâr, Vol. 2, pp. 390, 391.

ARTICLE 209.

(مادة ٢٠٩) — و منها ولاية تاديدها اذا لم تقطع ... و ... استعجاب معشرتها
بالمعروف — [البحر الرائق جلد ثالث كتاب النكاح، صفحة ٨٤]

Bahrr-ul-Rayek, Vol. 3, p. 84.

ARTICLE 210.

(مادة ٢١٠) — ان خفتم يا ايها الحكماء شقاق اى عداوة بينهما ... فابعثوا حكميين
حكما من اهل الزوج وحكما من اهل المرأة ... ان يريد الزوجان اصلاحا يوفق الله بين
ذيكما الزوجين ... و ان الحكميين لا يلبان الجمع و التفريق الا باذن الزوجين --
[تفسير احمدى سورة نساء پارٔ پنجم، صفحة ٢٨٠ - ٢٨١]

Tafseer-i-Ahmedi, pp. 280, 281.

ARTICLE 211.

(مادة ٢١١) — و لو قلت انه يضربني و يؤذياني ... فان صدقوها ... و ... علم
القاضي ذلك وجرة — [ردالمحتار جلد ثاني كتاب الطلاق، صفحة ٧٢٠]

Radd-ul-Muhtâr, Vol. 2, p. 720.

CHAPTER IV.

الباب الرابع فيما للزوجة وما عليها من الحقوق

SECTION I.

الفصل الاول فيما تنال الزوجة من الحقوق لزوجها

ARTICLE 212.

(مادة ٢١٢) — ففعل استمتاع كل منهما بآخر على الوجه المأثور فيه شرعا ...
وهلك العيس ... و وجوب السهر والسفة ... و حقوقهن و وجوب الغائنة عليها اذا دعاها

الى الفراش ... وليس لها ان تعطي شيأ من بيته بغير اذنه — [فتاوى عالمگیری
جلد ثاني كتاب النكاح صفحة ١٧٣ - ١٧٥]

Fatawa-i-Alamgiri, Vol. 2, pp. 173, 175.

SECTION II.

الفصل الثاني فيما للمرأة من الحقوق

ARTICLE 213.

(مادة ٢١٣) — ولها منع من الوطء ودواعيه ... والسفر بها ولو بعد وطئ ...
رضيتها ... لاخذ ما بين تعجيله من المهر كله او بعضه ... ان لم يبين تعجيله ...
فلها المنع لاخذ ما يعجل لمآلها ... على اعتبار صرف بلدهما — ... ولها منع ان اجله
كله ... اذ لم يشترط الدخول قبل حلول الاجل فلو شرطه ورضيت به ليس لها الامتناع —
[ردالمحتار جلد ثاني كتاب النكاح صفحة ٣٨٨ - ٣٨٩]

Radd-ul-Muhtár, Vol. 2, pp. 388, 389.

ARTICLE 214.

(مادة ٢١٤) — لها ... الخروج من بيت زوجها ... بلا اذنه ما لم تقبض المعجل
فلها النفقة — [ردالمحتار جلد ثاني كتاب النكاح صفحة ٣٨٨ - ٣٨٩]

Radd-ul-Muhtár, Vol. 2, pp. 388, 389.

ARTICLE 215.

(مادة ٢١٥) — انها تخرج ... لزيارة ... الوالدين في كل جمعة ... مرة ...
والمعاري في كل سنة مرة ... ولا يمنعها من الدخول عليها في كل جمعة وفي غيرهما
من المعاري في كل سنة ويمنعهم ... من البيوت ... عندما — [ردالمحتار جلد
ثاني كتاب الطلاق صفحة ٧٢١]

Radd-ul-Muhtár, Vol. 2, p. 721.

ARTICLE 216.

(مادة ٢١٦) — و لو ابوها ... مريضا مرضا طويلا ... فاحتاجها و ... لم يكن له
من يقوم عليه ... فعلها ناعدا ... بقدر احتياجه اليها ... ولو كافرا وان ابى الزوج —
[ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢١]

Radd-ul-Muhtár, Vol. 2, p. 721.

BOOK III.

الكتاب الثالث في فرق النكاح

CHAPTER I.

الباب الاول في الطلاق

SECTION I.

الفصل الاول فيمن يقع طلاقه ومن لا يقع ومحل الطلاق وعدده

ARTICLE 217.

(مادة ٢١٧) — وجعلت ولاية الى الرجل لانه المالك — [عيني در حاشيه كنزالدقائق كتاب الطلاق صفحه ١١٠]

يقطع طلاق كل زوج بالغ مائل ولو عبدا او مكرها ... او هازلا — [الدرالمختار جلد ثاني كتاب الطلاق صفحه ١٣٣] — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحه ٥٥]
فيقع من المريض — [البحر الرائق جلد ثالث كتاب الطلاق صفحه ٢٦٣] اي لم يزل عقله بالمرض — [ردالمحتار جلد ثاني كتاب الطلاق صفحه ٢٦١]

Aieni, p. 110 ; Durrul-Mukhtâr, p. 133 ; Fatawa-i-Alamgiri, Vol. 2, p. 55 ; Bahrr-ul-Rayek, Vol. 3, p. 263 ; Radd-ul-Muhtâr, Vol. 2, p. 461.

ARTICLE 218.

(مادة ٢١٨) — وطلاق السكران واقع (سواء كان سكرة من الخمر او الاشربة الاربعة المعروفة او غيرها) — ردالمحتار جلد ثاني كتاب الطلاق صفحه ١٥٩) — ولو اكره على شرب الخمر او شرب الخمر لضرورة وسكر وطلق امرأته ... لا يقع طلاقه — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحه ٥٥]

Radd-ul-Muhtâr, Vol. 2, p. 459 ; Fatawa-i-Alamgiri, Vol. 2, p. 55.

ARTICLE 219.

(مادة ٢١٩) — ويقع طلاق الاخرى بالاشارة — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحه ٥٥]

Fatawa-i-Alamgiri, Vol. 2, p. 55.

ARTICLE 220.

(مادة ٢٢٠) — لا يقع طلاق ... المجنون — الا اذا علق عقلا ثم جن فوجد الشرع ... وقع الطلاق — (واراد بالمجنون من في عقله اختلال — البعثر الرائق جلد ثالث كتاب الطلاق صفحة ٢٦٨) ... والمعنونة ... والناثم — [الدر المختار جلد ثاني كتاب الطلاق صفحة ١٩] — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ٥٥]

Bahrr-ul-Rayek, Vol. 3, p. 263; Durrul-Mukhtár, Vol. 2, p. 19; Fatawa-i-Alamgiri, Vol. 2, p. 55.

ARTICLE 221.

(مادة ٢٢١) — ولا يقع طلاق الصبي — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ٥٥] ولو مرافقا — [الدر المختار جلد ثاني كتاب الطلاق صفحة ١٩] واحترز ... عن والد الصغير — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٤٥٢]

Fatawa-i-Alamgiri, Vol. 2, p. 55; Durrul-Mukhtár, Vol. 2, p. 19; Radd-ul-Muhtár, Vol. 2, p. 452.

ARTICLE 222.

(مادة ٢٢٢) — وركنه لفظ مخصوص ... واراد اللفظ ولو حكما ليدخل الكتابة المستيينة — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٤٥٢] ولو قال وكلتك في جميع امور التي يعجز بها التوكيل كانت الوكالة عامة في البديعات والانكحة وكل شيء — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ٩٠]

ولو كذب على وجه الرسالة والخطاب ... طلقت بوصول الكتاب اليها — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٤٦٣]

ذكر ما يوقعه غيره بانته و انواعه ثلثة تفويض وتوكيل ورسالة ... و ... طلقتي ضربك ... كان ... توكيلا في حق ضربها ... لاها عاهلة فيه لغيرها — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٥١٤ - ٥١٥ - ٥١٦]

Radd-ul-Muhtár, Vol. 2, pp. 452, 464, 514, 515, 516; Fatawa-i-Alamgiri, Vol. 2, p. 90.

ARTICLE 223.

(مادة ٢٢٣) — محله المنكحة ... ولو معتدة عن طلاق رجعي او بائن غير ثلاث في حرة ... او عن فسخ بتفريق لبااء احدهما عن الاسلام — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٤٥٢]

وكل فرقة هي طلاق (كالفرقة في الآلاء ... والعجب والعنة) يقع الطلاق في مدتها
[ردالمحتار جلد ثاني كتاب الطلاق صفحة ٥١٣] — يستثنى هذه النعان — [حاشية
بهرالرائق جلد ثالث كتاب الطلاق صفحة ٢٥٥]

Radd-ul-Muhtâr, Vol. 2, pp. 452, 513; Bahrr-ul-Rayek, Vol. 3, p. 255.

ARTICLE 224.

(مادة ٢٢٤) — واعتبار عدده بالنساء ... فطلاق حرة ثلاث — [الدرالمختار جلد
ثاني كتاب الطلاق صفحة ١٩]

طاق غير المدخول بها ثلاثاً وقعن وإن فوق ثلثت بواحدة ... وقيد بغير المدخولة
لأن المدخولة يقع عليها الكل — [البهرالرائق جلد ثالث كتاب الطلاق صفحة ٣١٥ - ٣١٥
لا — أي لا يكمج البجاة بل ثلاث لو حرة ... حتى يطأها غيره ... بنكاح صحيح ونمضي
عدته — [البهرالرائق جلد رابع كتاب الطلاق صفحة ٦١]

Durrul-Muhtâr, Vol. 2, p. 19; Bahrr-ul-Rayek, Vol. 3, pp. 314, 315; Vol. 4, p. 61.

ARTICLE 225.

(مادة ٢٢٥) — ركن الطلاق اللفظ الذي يدل دلالة على معنى الطلاق ... أو ما
يقوم مقام اللفظ — [البهرالرائق جلد ثالث كتاب الطلاق صفحة ٢٥٢] الطلاق على ضربين
صريح وكناية — [هداية جلد ثاني كتاب الطلاق صفحة ٣٣٩] صريح ما لم يستعمل إلا
فيه (أي غالباً) ولو بالفارسية — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٤٦٥] — قلت
اكتفت على وجه الرسم منونة فهي صريح والا فكناية — [البهرالرائق جلد ثالث كتاب
الطلاق صفحة ٢٧٢] — أنت طالق هكذا مشهوراً بالأصابع ... وقع بعدد —
[الدرالمختار جلد ثاني كتاب الطلاق صفحة ٢١] وعرفه ... بما يثبت حكمه الشرعي بلا
نية و أراد بما اللفظ أو ما يقوم مقامه عن النكبة المستبينة أو الإشارة المفهومة —
[ردالمحتار جلد ثاني كتاب الطلاق صفحة ٤٦٥] — قيد بخطابها لأنه لو قال إن خرجت
يقع الطلاق ... فخرجت لم يقع لتركه الإضافة (أي التعنوية فإنها الشرط) إليها —
[ردالمحتار جلد ثاني كتاب الطلاق صفحة ٤٦٥] كناية ... ما لم يوضع له. أي الطلاق .
واحتمله وغيره والكمالات لا تطلق بها ... إلا بيقينه أو دلالة الحال — [الدرالمختار جلد
ثاني كتاب الطلاق صفحة ٢٣]

وطلاق الآخرس واقع بلاشارة لأنها صارت معهودة وقيمت مقام العبارة — [هداية
جلد ثاني كتاب الطلاق صفحة ٣٣٩]

Bahrr-ul-Rayek, Vol. 3, pp. 252, 272; Hidaya, Vol. 2, p. 339; Radd-ul-Muhtâr, Vol. 2, p. 465; Durrul-Mukhtâr, Vol. 2, pp. 21, 23.

SECTION II.

الفصل الثاني في اقسام الطلاق

ARTICLE 226.

(مادة ٢٢٦) — فشميل البائن بقسيمه و الرجعي — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٤٥٩]

وهي نوعان خفيفة و غليظة — نوي حكم الثلاث و هو البيئونة الغليظة — لم تصح نية الثلاث و ان كانت بائنة ايضاً — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٤٨٧] — لانه لفظ واحد صالح للبيئونة الصغرى و الكبرى — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٤٨٩] — و البائن اعم من البائن الاعمر و الاكبر — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٠١]

Radd-ul-Muhtâr, Vol. 2, pp. 456, 487, 489 ; Tahtâvî, Vol. 2, p. 101.

ARTICLE 227.

(مادة ٢٢٧) — فالصريح الرجعي ان يكون الطلاق بعد الدخول حقيقة ليس مقرونا بعرض ولا بعدد الثلاث لا نصاً ولا اشارة ولا موصوفاً بصفة تنبئ عن البيئونة او تدل عليها من غير حرف العطف ولا مشبهاً بعدد او صفة تدل عليها — [البعثرالرائق جلد ثالث كتاب الطلاق صفحہ ٢٧٥]

و اشار بانعش الطلاق الى كل وصف على افعل لانه للتفاوت و هو يحصل بالبيئونة و هو انعش من الطلاق الرجعي — [البعثرالرائق جلد ثالث كتاب الطلاق صفحہ ٣١٠]

طلقتك و انت طالق و مطلقة ... يقع بها ... واحدة رجعية و ان نوى خلافها من البائن او اكثر ... او لم ينو شيئاً — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٤٦٥ - ٤٦٦ - ٤٦٧]

Bahrr-ul-Rayek, Vol. 3, pp. 275, 310 ; Radd-ul-Muhtâr, Vol. 2, pp. 465, 466, 467.

ARTICLE 228.

(مادة ٢٢٨) — وفي انت الطلاق ... يقع واحدة رجعية ان لم ينو شيئاً او نوى واحدة او اثنتين ... فان نوى ثلاثاً فثلاث ... ومن الالفاظ المستعملة الطلاق يلزمي ... و على الطلاق — [الدرالمختار جلد ثاني كتاب الطلاق صفحہ ١٩]

Durrul-Mukhtâr, Vol. 2, p. 19.

ARTICLE 229.

(مادة ٢٢٩) — تطلق واحدة رجعية في اعتدي واستبرئي رحمك وانت واحدة ولو نوى ثلثا او ثنتين — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ٦٩]
 الكنايات ثلاث ما يحتمل الرد او ما يصلح للسب او لا ولا ... ونحو اعتدي واستبرئي رحمك انت واحدة ... لا يحتمل السب والرد — اى بل معناه الجواب فقط —
 ففي حالة الرضاء ... تتوقف الاقسام الثلاثة ... على نية ... وفي الغضب ... الاولان ...
 ولا يتوقف ما يتعين للجواب ... وفي مذاكرة الطلاق يتوقف الاول فقط ويقع بالآخرين
 وان لم ينو... وتقع رجعية (اى وان نوى البائن) بقوله اعتدي واستبرئي رحمك
 وانت واحدة وان نوى اكثر — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٥٠٢ - ٥٠٣]

Fatawa-i-Alamgiri, Vol. 2, p. 69 ; Radd-ul-Muhtâr, Vol. 2, pp. 502, 503, 504, 505.

ARTICLE 230.

(مادة ٢٣٠) — وعلى هذا مبنى حل الوطي و حرمة نعدنا يحل لقيام ملك النكاح من كل وجه وانما يزول عند انقضاء العدة فيكون الحل قائما قبل انقضائها — [فتح القدير جلد ثاني كتاب الطلاق صفحة ٢١٢]
 ان الرجعي لا يزول فيه النكاح — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٥٠]
 ولا تخرج معتدة رجعي وبائن ... لحررة ... مكلفة من بيتها — (و المراد به ما يضاف اليها بالسكنى ...) اصلا — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٧٢ - ٦٧٣]
 ثم الظاهر ندب السترة فيه — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٧٤]
 وتجب ... (النفقة) ... لمطابقة الرجعي — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٧٤]

لا يكره دخوله اذا لم تأذن له ... وندب عدم دخوله بلا انهما عليها — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٥٧٦]

والطلاق الرجعي لا يعزم الوطي — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٥٨٢]
 وكما يثبت الرجعة بالقول تثبت بالفعل وهو الوطي — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ٢٦]

اذا طلق امرأته طلاقا رجعيا في حال صحتها او في حال مرضه برضاها او بغير رضاها ثم مات وهي في العدة فانهما يتوارثان — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٢٢]

ولو وعلتها كان مراجعا — [فتاوى سراجيه در حاشيه قاضيان كتاب الطلاق

صفحة ٢٥٩]

Fath-ul-Kadir, Vol. 2, p. 242 ; *Radd-ul-Muhtâr*, Vol. 2, pp. 576, 582, 650, 672, 673, 674, 726 ; *Fatawa-i-Alamgiri*, Vol. 2, p. 122, 126 ; *Fatawa-i-Serajiah*, p. 259.

ARTICLE 231.

(ماده ٢٣١) — وتصح (الرجعة) في العدة — (اى عدة الدخول حقيقة اى الوطى — رد المختار جلد ثاني كتاب الطلاق صفحة ٥٧٤)

ان لم يطلق ثلاثا — (...) ومراة ان لا يكون باثنا سواء كان واحدة او ثنتين وقدمنا الرجعي والثنان في الامة كالثلث في الحررة) — و لو لم ترض — [البحر الرائق جلد رابع كتاب الطلاق صفحة ٤٠٤]

هي استدامة ملك القائم بلا عوض (اى بلا اشتراط عوض) مادامت في العدة اى عدة الدخول حقيقة ان لا رجعة في عدة الخلوة (اى ولو كان معها لمس او نظر بشهوة ولو الى الفرج الداخل) ... وان ابت (اى سواء رضيت بعد علمها او ابت وكذا لو لم تعلم بها اصلا) او قال ابطلت رجعتي او لا رجعة لي — [رد المختار جلد ثاني كتاب الطلاق صفحة ٥٧٤ - ٥٧٥ - ٥٧٦]

وقيد بقيام العدة لانه لا رجعة بعد انقضائها — [البحر الرائق جلد رابع كتاب الطلاق صفحة ٤٠٤]

Radd-ul-Muhtâr, Vol. 2, pp. 574, 575, 576 ; *Bahrr-ul-Rayek*, Vol. 4, p. 54.

ARTICLE 232.

(ماده ٢٣٢) — وتصح ... بنحو ... راجعتك ... (الاولى ان يقول بالقول ... اى في حال خطبتها ومثله راجعت امرأتي في حال غيابها وحضورها ايضا) — وبالفعل ... بكل ما يوجب حرمة المصاهرة ... ولو منها اختلاسا ... ولا فرق بين كون التقبيل والمس والنظر بشهوة منه او منها — [رد المختار جلد ثاني كتاب الطلاق صفحة ٥٧٤ - ٥٧٥]

Radd-ul-Muhtâr, Vol. 2, pp. 574, 575.

ARTICLE 233.

(ماده ٢٣٣) — ومن احكامها انه لا يصح اضافتها الى وقت في المستقبل ولا تعليقها بالشروط — [البحر الرائق جلد رابع كتاب الطلاق صفحة ٤٠٤]

Bahrr-ul-Rayek, Vol. 4, p. 54.

ARTICLE 234.

(مادة ٢٣٤) — افاد به ان علمها بها لا يشترط مطلقا — [طحاوي جلد ثاني
كتاب الطلاق صفحة ١٧١]

ونذب اعلامها بها ... ونذب الاشهاد — (اى الاشهاد على القول ... وان لم
يشهد صح) — بعدلين ولو بعد الرجعة بالفعل — [رد المحتار جلد ثاني كتاب الطلاق
صفحة ٥٧٦]

Tahtavi, Vol. 2, p. 171 ; Radd-ul-Muhtâr, Vol. 2, p. 576.

ARTICLE 235.

(مادة ٢٣٥) — ونقطع الرجعة ان ظهرت من الحيض الاخير — (لتنام عشرة
ايام) — وان لم تغسل — [البحر الرائق جلد رابع كتاب الطلاق صفحة ٥٧]

Bahrr-ul-Rayek, Vol. 4, p. 57.

ARTICLE 236.

(مادة ٢٣٦) — قالت مضت عدتي والمدة تحتله وكذبها الزوج قبل قولها
مع حلفها ... ثم ... لو بالحيض فاقلها لحرة ستون يوما. — [الدر المختار كتاب الطلاق
جلد ثاني صفحة ١٤٤]

Durrul-Mukhtâr, Vol. 2, p. 44.

ARTICLE 237.

(مادة ٢٣٧) — واذا طلقها ثم رجعها يبقي الطلاق وان كان لايزيل العلل
والقيد في الحال لانه يزيلهما في المال حتى انضم اليه ثنتان — [فتاوى عالمگیری
جلد ثاني كتاب الطلاق صفحة ٥٢]

Fatawa-i-Alamgiri, Vol. 2, p. 52.

ARTICLE 238.

(مادة ٢٣٨) — و ... المؤجل ... لا يكون حالا حتى تنقضي العدة — [رد المحتار
جلد ثاني كتاب الطلاق صفحة ٥٧٦]

اى لان العادة تأجيله الى طلاق يزيل الملك او الى الموت و الرجعي لا يزيل
الملك الا بعد مضي العدة ولا يصير حالا قبلها — [رد المحتار جلد ثاني كتاب الطلاق
صفحة ٥٧٦]

اما اذا كان الى مدة معينة فلا يتعجل — [رد المحتار جلد ثاني كتاب الطلاق

صفحة ٥٧٦]

Radd-ul-Muhtâr, Vol. 2, p. 576.

القسم الثاني في الطلاق البائن ونوعيه واحكام كل منهما

ARTICLE 239.

(مادة ٢٣٩) — واما الصحيح البائن فبخلافه وهو ان يكون بحرف الابانة او بحروف الطلاق لكن قبل الدخول حقيقة او بعده لكن مقرونا بعدد الثلاث نصا او اشارة او موصوف بصفة تدبى عن البينونة او تدل عليها من غير حرف العطف او مشبها بعدد او صفة تدل عليها — [البعرا الرائق جلد ثالث كتاب الطلاق صفحہ ٢٧٥]

و اشار بافحش الطلاق الى كل وصف على افعل لانه للتفاوت وهو يحصل بالبينونة — [البعرا الرائق جلد ثالث كتاب الطلاق صفحہ ٣١٠]

و يقع بقوله انت طالق بائن او البتة ... او كالجبل ... او تطليقة شديدة او طويلة او عريضة ... او اشد ... او اعرضه او اعوله ... واحدة بائنة في الكل ... ان لم ينو ثلاثا في الحرة — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٢٤ - ١٢٥]

ظاهر كلامه صحة نية الثلاث في جميع ما مر و ... لكن قال العقابي الصحيح انها لا تصح في تطليقة شديدة او طويلة او عريضة لان ... تطليقة بقاء الوحدة لا تحتل الثلاث ... قلت لكن المتون على خلافه — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٤٨٧]

انت طالق هكذا و اشار بثلاث اصابع فهي ثلاث — [البعرا الرائق جلد ثالث كتاب الطلاق صفحہ ٣٠٩]

كما لو قال اكثر الطلاق او انت طالق مرارا او الوفا ... فثلاث — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٤٨٩]

ولو قال انت طالق ثلاثا من هذا العمل طلقت ثلاثا — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ٥٦]

Bahr-ul-Rayek, Vol. 3, pp. 275, 309, 310; Tahtavi, Vol. 2, pp. 124, 125; Radd-ul-Muhtâr, Vol. 2, pp. 487, 489; Fatawa-i-Alamgiri, Vol. 2, p. 56.

ARTICLE 240.

(مادة ٢٤٠) — قال لزوجته غير المدخول بها انت طالق ... ثلاثا ... وقعن ... وان فرق ... بانث بالاولى لا الى عدة و ... لم تقع الثانية — (المراد بها ما بعد الاولى فيشمل الثالثة) بخلاف الموطوءة - اى ولو حكما كما لمختلفي بها فانها كالموطوءة في لزوم العدة — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ١٠٩٢ - ١٠٩٣]

اختلف الاحكام في الخلوة ... ولم يتعرضوا للطلاق الاول و افاد الرحمتي انه بائن
ايضا لانه طلاق قبل الدخول غير موجب للعدة — [رد المحتار جلد ثاني كتاب النكاح
صفحة ٣٧٠]

Radd-ul-Muktâr, Vol. 2, pp. 370, 492, 493.

ARTICLE 241.

(مادة ٢٤١) — و اذا طلق الرجل امرأته تطليقة رجعية او تطليقتين فله ان
يراجعها في عدتها ... ولا بد من قيام العدة ... لانه لا ملك بعد انقضائها — [هداية جلد
ثاني كتاب الطلاق ٣٧٤ - ٣٧٥]

فاذا انقضت العدة بطل حق المراجعة — [جامع الرموز كتاب الطلاق
صفحة ٢٣٥]

Hidaya, Vol. 2, pp. 374, 375 ; Jami-ur-Romuz, p. 235.

ARTICLE 242.

(مادة ٢٤٢) — وان طلق بمال اى قال لها انت طالق بعوض مال
... وقع بائن ... ان قبلت المرأة المال في المجلس — [جامع الرموز كتاب الطلاق
صفحة ٢٤٠]

Jami-ur-Romuz, p. 240.

ARTICLE 243.

(مادة ٢٤٣) — قلت يعني بخلاف حلال الله او حلال المسلمين فانه يعم ...
وذلك بعمل القول بانه يقع على كل واحدة منهن طلقة على ما اذا كان اللفظ عاماً —
[رد المحتار جلد ثاني كتاب الطلاق صفحة ٢٠٢]

رجل قال كل حل عليّ حرام ... او قال كل حلال الله او قال حلال المسلمين ...
ولم ينو شيئاً ... تبين منه امرأته بتطليقة واحدة وان نوى ثلثاً فثلث — [فتاوى
قاضيخان جلد ثاني كتاب الطلاق صفحة ٢٤٧]

قوله حرام ... وسيأتي وقوع البائن به بالنية ... لا فرق في ذلك بين ... حرمتك
سواء قال عليّ ام لا ... وانت معي في العوام — [طحاوي جلد ثاني كتاب الطلاق
صفحة ١٣٣]

قال لامرأته انت عليّ حرام ... يُقضى بانه طلاق بائن وان لم ينو ... ومثله
انت معي في العوام و العوام يلزمني و حرمتك عليّ — [طحاوي جلد ثاني كتاب
الطلاق صفحة ١٨٣ - ١٨٤]

واقول هذا لا يتم في قوله انت علي حرام مخاطبا لواحدة ... بل في هذا يجب ان لا يقع الا على المخاطبة — [البعر الرائق جلد رابع كتاب الطلاق صفحہ ۷۵]

Radd-ul-Muhtâr, Vol. 2, p. 602 ; Fatawa-i-Kazi Khan, Vol. 2, p. 247 ; Tahtavi, Vol. 2, pp. 133, 183, 184 ; Bahrr-ul-Rayek, Vol. 4, p. 75.

ARTICLE 244.

(ماده - ۲۴۴) — وهي (الكنايات) على ضربين منها ثلاثة الفاظ يقع بها طلاق رجعي ولا تقع بها الا واحدة وهي قوله اعتدى واستبرئى رحمك وانت واحدة ... وبقيّة الكنايات اذا نوى بها الطلاق كانت واحدة بائنة وان نوى ثلثا كان ثلثا وان نوى ثنتين كانت واحدة بائنة — [هداية جلد ثاني كتاب الطلاق صفحہ ۳۵۳ - ۳۵۴]

Hidaya, Vol. 2, pp. 353, 354.

ARTICLE 245.

(ماده ۲۴۵) — الایلاء ... هو ... الحلف على ترك قربانها مدته ... وشرطه معلیة المرأة ... واهلیة الزوج للطلاق ... وحكمه وقوع طلاق بائنة ان برولم یطأ ... والمدة اقلها للحرّة اربعة اشهر ... لو قال والله ... لا اقربك ... اربعة اشهر ... فان قربها في المدة ... حدث ... والا ... بانث بواحدة بمضیها — [طحطاوي جلد ثاني کتاب الطلاق صفحہ ۱۷۸ - ۱۷۹ - ۱۸۰ - ۱۸۱]

Tahtavi, Vol. 2, pp. 178, 179, 180, 181.

ARTICLE 246.

(ماده ۲۴۶) — وانما يحصل زوال الملك عقیده اذا كان طلاقا ... بائنا — [البعر الرائق جلد ثالث کتاب الطلاق صفحہ ۲۵۳]

هو (الطلاق) ... رفع قيد النكاح (المراد بالقيّد الاحكام التي عرضت بسبب النكاح) في الحال بالبائن ... و البائن اعم من البائن الاصغر والاكبر واعترض بان القيد لم يرتفع فيه لوجوب العدة — [طحطاوي جلد ثاني کتاب الطلاق صفحہ ۱۰۱]

وتعتدان اي معدة طلاق وموت في بيت وجبت فيه — وهو المنزل الذي يضاف اليها بالسكنى — ولا يخرجان منه ... ولا بد من ستر بينهما في البائن ... وان ضاق المنزل عليهما او كان الزوج فاسقا فخروجه اولى — [طحطاوي جلد ثاني کتاب الطلاق صفحہ ۲۳۰ - ۲۳۱]

وان ابانها في الصحة ثم مرض ومات وهي في العدة لم ترث — [فتاوى قاضيان جلد ثاني کتاب الطلاق صفحہ ۲۶۸]

و الأصل فيه ان احد الزوجين اذا باشر الفرقة بعد ما تعلق حق الآخر بماله ورثه الآخر — [فتاوى قاضيهان جلد ثاني كتاب الطلاق صفحة ٢٦٨]

Bahrr-ul-Rayek, Vol. 3, p. 253; Tahtavi, Vol. 2, pp. 101, 230, 231; Fatawa-i-Kazi Khan, Vol. 2, p. 268.

ARTICLE 247.

(مادة ٢٤٧) — و ينكم مباتته في العدة و بعدها — اي المباتة بما دون الثلاث لان المحلية باقية ... و منع الغير في العدة — [البهر الرائق جلد رابع كتاب الطلاق صفحة ٦١]
Bahrr-ul-Rayek, Vol. 4, p. 61.

ARTICLE 248.

(مادة ٢٤٨) — و ... حكمه ... زوال حل المناكحة متى تم ثلاثاً — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ٥٢]
لا ينكم مطلقة من نكاح صحيح نافذ ... بها اي بالثلاث لو حرة ... (قال لزوجته غير المدخول بها انت طالق ... ثلاثاً ... وقعن ... و ان فرق ... بانت بالاولى ... و ... لم تقع الثانية بخلاف الموطوءة حيث يقع الكل — رد المحتار جلد ثاني كتاب الطلاق صفحة ٥٨٢ - ١٤٩٢ - ١٤٩٣)
حتى يطأها غيره ... بنكاح نافذ ... و تمضي عدته (رد المحتار جلد ثاني كتاب الطلاق صفحة ٥٨٣ - ٥٨٤) (سواء كانت العدة مدة وفاة او طلاق — طحطاوي جلد ثاني كتاب الطلاق صفحة ١٧٥)
و الشرط التيقن بوقوع الوطء في المحل المتيقن به ... و الموت عنها لا — (اي لومات عنها قبل الوطء لا يعنها للاول) ... و ... يشترط ان يكون الايلاج موجبا للغسل — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٥٨٤ - ٥٨٥]

Fatawa-i-Alamgiri, Vol. 2, p. 52; Radd-ul-Muhtâr, Vol. 2, pp. 492, 493, 582, 583, 584, 585; Tahtavi, Vol. 2, p. 175.

ARTICLE 249.

(مادة ٢٤٩) — و الزوج الثاني — اي نكاح الزوج الثاني يهدم بالدخول ... مادون الثلاث ايضا — اي كما يهدم الثلاث ... فمن طلقت دونها و عادت اليه بعد آخر عادت بثلاث لو حرة — [طحطاوي جلد ثاني كتاب الطلاق صفحة ١٧٧]

ثم الحل الذي يثبت به اما ان يكون الحل السابق او حلاً جديداً لا سبيل الى الاول ... فتمين الثاني و بالضرورة يكون غير الاول ... فكان الجديد كاملاً و هو

ما يكون بالطلقات الثلاث — [عنايه حاشيته هدايه جلد ثاني كتاب الطلاق
صفحه ٣٨١]

Tahtavi, Vol. 2, p. 177 ; Hidaya, Vol. 2, p. 381.

ARTICLE 250.

(ماده ٢٥٠) — ولا يتحقق الطلاق في النكاح الفاسد بل هو متاركة فيه —
[البحر الرائق جلد ثالث كتاب النكاح صفحه ١٨٥ — رد المحتار جلد ثاني كتاب النكاح
صفحه ٣٨١]

Bahrr-ul-Rayek, Vol. 3, p. 185 ; Radd-ul-Muhtâr, Vol. 2, p. 381.

SECTION III.

الفصل الثالث في تعليق الطلاق

ARTICLE 251.

(ماده ٢٥١) — لما فرغ من بيان المذبحر شرع في المعلق — [البحر الرائق
جلد رابع كتاب الطلاق صفحه ٢]
التنجيز... عبارة عن إيقاعه في الحال وبقائه التعليق — [عمدة الرعايه حاشيه
شرح وقايه جلد ثاني كتاب الطلاق صفحه ٧١]
التعليق هو ... ربط حصول مضمون جملة بحصول مضمون جملة اخرى ويسمى
بمينا — [طحاوي جلد ثاني كتاب الطلاق صفحه ١٥٠]

Bahrr-ul-Rayek, Vol. 4, p. 2 ; Sharh-i-Vikaya, Vol. 2, p. 71 ; Tahtavi, Vol. 2, p. 150.

ARTICLE 252.

(ماده ٢٥٢) — وشرط صحته كون الشرط معدوما على خطر الوجود ... وكونه
متصلا لا لعذر — [طحاوي جلد ثاني كتاب الطلاق صفحه ١٥٠]
فالمحقق ... تنجيز- ليس على إطلاقه بل فيما لبثائه حكم ابتدائه - والمستحيل ...
لغو — [رد المحتار جلد ثاني كتاب الطلاق صفحه ٥٣٥]
قال لها انت طالق ان شاء الله متصلا (قيد بالاتصال لانه لو كان بينهما سكوت كثير
بلا ضرورة ثبت حكم الكلام الاول — البحر الرائق جلد رابع كتاب الطلاق صفحه ٣٩)
... مسموعا ... لا يقع للشك — [طحاوي جلد ثاني كتاب الطلاق صفحه
١٥٩ - ١٦٠]

كما لغا إيقاعه مقارنا لثبوت ملك كانت طالق مع نكاحك ... او زواله كمع موتي
او موتك . فانه اضافة الى حالة مضافية للإيقاع (في الاول) و الرقوع (في الثاني) —

[ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۵۳۷] — طحطاوي جلد ثاني كتاب الطلاق صفحہ ۱۵۱-۱۵۲]

Tahtavi, Vol. 2, p. 150 151, 152, 159, 160; Radd-ul-Muhtâr, Vol. 2, p. 535, 537; Bahrr-ul-Rayek, Vol. 4, p. 39.

ARTICLE 253.

(مادہ ۲۵۳) — انما يصح في الملك ... (اطلق الملك فاناد انه يشمل الحقيقي كالملك حال بقاء النكاح والعكس كقبض العدة والتعليق يصح فيهما وقدما ... ان تعليق الطلاق المعتبرة فيهما صحيح في جميع الصور الا اذا كانت معتدة عن بائن وعلق بانئا) او مضافا اليه ... فلو قال لاجنبية ان زرت فانت طالق فنكحها فزارت لم تطلق — [البحر الرائق جلد رابع كتاب الطلاق صفحہ ۹۰-۹۱]

Bahrr-ul-Rayek, Vol. 4, pp. 4, 9.

ARTICLE 254.

(مادہ ۲۵۴) — و يبطل تنجيز الثلاث للحرة ... تعليقه الثلاث وما دونها ... لا تنجيز ما دونها — اعلم ان التعليق يبطل بزوال العلق لا بزوال الملك فلو علق الثلاث او ما دونها بدخول الدار ثم نجز الثلاث ثم نكحها بعد التحليل بطل التعليق فلا يقع بدخولها شيء ولو كان نجز ما دونها لم يبطل فيقع المعلق كله — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ۱۵۲]

Tahtavi, Vol. 2, p. 152.

ARTICLE 255.

(مادہ ۲۵۵) التعليق يبطل بزوال العلق ... بتنجيز الثلاث — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۵۳۹]

وان قال لها ان دخلت الدار فانت طالق ثلاثا ثم قال انت طالق ثلاثا فزوجت غيره ودخل بها ثم رجعت الى الاول فدخلت الدار لم يقع شيء — [فتح القدير جلد ثاني كتاب الطلاق صفحہ ۲۲۶]

Radd-ul-Muhtâr, Vol. 2, p. 539; Fath-ul-Kadir, Vol. 2, p. 226.

ARTICLE 256.

(مادہ ۲۵۶) — وينحل اليمين بعد وجود الشرط مطلقا (اي سواء وجد الشرط في الملك ام لا) — لكن ان وجد في الملك طلق — ليس مرادة ان يوجد جميع الشرط في الملك بل ان يوجد تامه فيه ... و مرادة بالملك ما يعم الملك العكسي حكما كما اذا وجد في العدة ...) والا لا — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ۱۵۵]

Tahtavi, Vol. 2, p. 155.

ARTICLE 257.

(مادة ٢٥٧) — وفيها كلها تنحل اى تبطل — (فيعنت) اليمين ... اذا وجد الشرط مرة — (فلا يتصور العنت مرة اخرى) — الا في كلما فانه ينحل بعد الثلاث ... فلا يقع ان انكحها بعد زوج آخر الا اذا دخلت ... على الزوج — (فلا تنحل اليمين بعد الثلاث) نحو كلما تزوجتك فانت كذا — لدخولها على مذهب الملك ... وهو الزوج — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٥٤ - ١٥٥]

Tahtavi, Vol. 2, pp. 154, 155.

ARTICLE 258.

(مادة ٢٥٨) — علق ... الطلاق ... بشيئين حقيقة بتكرار الشرط — و ذلك بان عطف شرطا على آخره اخر الجزاء . اولا — اى لم يذكر الشرط بان يكون فعلا متعلقا بشيئين — يقع المعلق ان وجد الشرط الثاني في الملك و الا لا — لاشراط الملك حالة العنت — والمسئلة رابعة — لانها اما ان يوجد في الملك او خارجه او الاول فقط في الملك او العكس فان كان الثاني في الملك وقع الطلاق سواء كان الاول في الملك اولا — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٥٨]

Tahtavi, Vol. 2, p. 158.

ARTICLE 259.

(مادة ٢٥٩) — وما لا يعلم وجوده الا منها صدقت في حق نفسها خاصة ... كقوله ان حضت فانت طالق وفلاة ... فلورالت حضت و الحيض قائم (فان انقطع لا يقبل قولها) ... طلقت هي فقط ان كذبها الزوج — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٥٩]

Tahtavi, Vol. 2, p. 156.

SECTION IV.

الفصل الرابع في تفويض الطلاق للمرأة

ARTICLE 260.

(مادة ٢٦٠) — لما فرغ من بيان ما يوقعه الزوج بنفسه ... شرع فيما يوقعه غيره باذنه ... والتفويض اليها يكون بلفظ التخيير والامر باليد والمشيئة — [البهوارائق جلد ثالث كتاب الطلاق صفحہ ٣٣٥]

اشار بعدم ذكر قبولها الى انه تمليك يتم بالملك وهذه فلورجع قبل انقضاء المجلس لم يصح — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٣٩]

وليس للزوج ان يرجع قبل انقضاء المجلس — [فتح القدير جلد ثاني كتاب الطلاق
صفحة ٢٠٠]

Bahrr-ul-Rayek, Vol. 3, p. 335 ; Tahtavi, Vol. 2, p. 139 ; Fath-ul-Kadir, Vol. 2, p. 200.

ARTICLE 261.

(مادة ٢٦١) — قال لها اخذاري او امرى بيدك ينوى تفويض الطلاق ... فلها ان تطلق في مجلس علمها به مشافهة (اى في الحاضرة ... او اخبارا في الغائبة — ردالمحتار جلد ثاني كتاب الطلاق صفحة ٥١٥)

و ان طال ... ما لم يوقته ... ما لم تقم ... او ... تعمل ما يقطع مما يدل على الاعراض ... لا تطلق بعده اى المجلس الا اذا زاد ... متى شئت او متى ما شئت او اذا شئت او اذا ما شئت — [طحطاوي جلد ثاني كتاب الطلاق صفحة ١٣٩ - ١٤٠]

ولو قال جعلت لها ان تطلق نفسها اليوم اعتبر مجلس علمها في هذا اليوم فلو مضى اليوم ثم علمت خرج الامر عن يدها وكذا كل وقت قيد التفويض به وهي غائبة ولم تعلم حتى انقضى بطل خيارها — [طحطاوي جلد ثاني كتاب الطلاق صفحة ١٣٩]

Radd-ul-Muhtâr, Vol. 2, p. 515 ; Tahtavi, Vol. 2, pp. 139, 140.

ARTICLE 262.

(مادة ٢٦٢) — وفي اختاري نفسك لا تصح نية الثالث ... (بخلاف ... امرى بيدى — اى فتصح فيه نية الثالث) بل تبين بوحدة ان قالت اخترت نفسي — [طحطاوي جلد ثاني كتاب الطلاق صفحة ١٤١]

اذا جعل امرها بيدها فاختارت نفسها في مجلس علمها بانث بوحدة — و ان كان الزوج اراد ثلثا فثلث و ان نوى واحدة او ثنتين ... فهي واحدة — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ٧٨]

و كل لفظ يصلح للايقاع منه يصلح للجواب منها ... فلو قالت ... طلق نفسي وقع — [طحطاوي جلد ثاني كتاب الطلاق صفحة ١٤٢]

Tahtavi, Vol. 2, pp. 141, 144 ; Fatawa-i-Alamgiri, Vol. 2, p. 78.

ARTICLE 263.

(مادة ٢٦٣) — فصل في المشيئة — قال لها طلقي نفسك ... فطلقت وقعت رجعية — [طحطاوي جلد ثاني كتاب الطلاق صفحة ١٤٦]

اذا قال لها طلقي نفسك ... فلها ان تطلق نفسها في ذلك المجلس خاصة — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ٨٦]

Tahtavi, Vol. 2, p. 146 ; Fatawa-i-Alamgiri, Vol. 2, p. 86.

ARTICLE 264.

(مادة ٢٦٤) — قال لها طلقي نفسك ثلاثا او اثنتين وطلقت واحدة — (لو قال وطلقت اقل وقع ما وقعته ... لكان الاولى) وقعت ... لا يقع شيء في عكسه — اى لا يقع فيما اذا امرها بالواحدة فطلقت ثلاثا ... ومثل الثلاث الثنتان — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٤٧]

Tahtavi, Vol. 2, p. 147.

ARTICLE 265.

(مادة ٢٦٥) — امرها ببائين او رجعي فعكست في الجواب وقع ما امر الزوج به ويلغو وصفها — و الاصل ان المخالفة في الوصف لا تبطل ... وهذا اذا لم يكن معلقا بمشيتها فان علقه فعكست لم يقع شيء — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٤٧ - ١٤٨]

طلقي نفسك ثلاثا ان شئت فطلقت واحدة و كذا عكسه لا يقع فيها — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٤٧]

Tahtavi, Vol. 2, pp. 147, 148.

SECTION V.

الفصل الخامس في طلاق المريض

ARTICLE 266 & 267.

(مادة ٢٦٦ - ٢٦٧) — من غالب حاله الهلاك بمرض او غيره ... عجزه عن إقامة مصالحه خارج البيت ... او بارز رجلا ... او قدم ليقفل من قصاص ... او بقي على لوح من السفينة او قاطعت الامواج وخيف الغرق ... فار بالطلاق ... ولا يصح تبرعه الا من الثلث — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٦٥ - ١٦٦]

و يقال له الفار لفراره من ارضها — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٦٥]

Tahtavi, Vol. 2, pp. 165, 166.

ARTICLE 268.

(مادة ٢٦٨) — و المقعد و المفلوج و المسلول اذا تطاول ... كالمصحيح ثم ... حد التطاول سنة ... و ... المفلوج و المسلول و المقعد مادام يزداد كالمريض — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ١٦٥]

و المقعد و المفلوج مادام يزداد ما به كالمريض فان صار قديما ولم يزد فهو كالمصحيح ... صاحب البسل اذا طال به ذلك فهو في حكم الصحيح الا اذا تغير

حاله من ذلك التغير فيكون حال التغير من مرض الموت — [فتاوى عالمگیری
جلد ثاني كتاب الطلاق صفحہ ۱۲۳]

Tahtavi, Vol. 2, p. 165 ; Fatawa-i-Alamgiri, Vol. 2, p. 123.

ARTICLE 269.

(ماده ۲۶۹) — من غالب حاله الیلاک بمرض او غیره ... فار بالطلاق ... فلو
ابانها وهي من اهل الميراث — (ای من وقت الطلاق الی وقت الموت) ... طائعا بلا رضاها
... وهو كذلك ... ومات فيه ... بذلك السبب ... او بغیره ... فی العدة ... ورثت
هي منه — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۵۶۴ - ۵۶۵ - ۵۶۶ - ۵۶۷]
فلومح (الاولی فلو زال ذلك الحال ... ليعم) ثم مات في عدتها لم ترث —
[ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۵۶۶]

Radd-ul-Muhtâr, Vol. 2, pp. 564, 565, 566, 567.

ARTICLE 270.

(ماده ۲۷۰) — و کذا ترث طالبة رجعية ... (ای فی مرضه) طلقت بائنا او
ثلاثا ... ومن لاعنها فی مرضه لو اکل منها مریضا (اراد به ان يكون مضي المدة فی
المرض ایضاً) كذلك - ای ترثه — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۵۶۷]

Radd-ul-Muhtâr, Vol. 2, p. 567.

ARTICLE 271.

(ماده ۲۷۱) — لو اکره علی طلاقها البائن لا ترث و هذا لو كان الاكره بوعيد
تلف — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۵۶۶]

وان اکل فی صحته وبانت به ... فی مرضه ... او ابانها فارتدت فاسلمت فمات
لا ترثه ... لو كانت كتابية ... ثم اسلمت ... لم ترث كما لا ترث لو طلقها رجعيا او لم يطلقها
فطاعت — (المطاوعة ليست بقيد — اذ لو كانت مكرهة لا ترث ایضاً ... لكن لو اكره
ابوه بذلك ورثت) — او قبلت ابنه ... او ابانها بامرهما ... او اخلمت منه او اخفارت
نفسها — ولو بيلوغ ... وجب وعنة لم ترث لرضاها و لو كان الزوج معصوما بعبس
(عذارته فی الدر المنقي فی حصن و کذا عبارة غیره و الحصر وان كان ... يشمل
العبس و الحصن لكن مسألة العبس ذکرها بعد) او فی صف القتال (مثل من فی
الصف من كان راکب سفينة قبل خوف الغرق) — ومثله حال فشو الطاعون ... او قائماً
بمصالحه خارج البيت مشدکيا من الم ... او محبوسا بقصاص ... لا ترث — [ردالمحتار
جلد ثاني كتاب الطلاق صفحہ ۵۶۷ - ۵۶۸]

Radd-ul-Muhtâr, Vol. 2, pp. 566, 567, 568.

ARTICLE 272.

(مادة ٢٧٢) — و لو باشرت المرأة سبب الفرقة وهي ... مريضة و ماتت قبل انقضاء عدتها ورثها الزوج كما اذا وقعت الفرقة بينهما باختيارها نفسها في خيار البلوغ ... او بتقبلها او مطاوعتها ابن زوجها — [طحاوي جلد ثاني كتاب الطلاق صفحة ١٦٩]

Tahtavi, Vol. 2, p. 169.

CHAPTER II.

الباب الثاني في الخلع

ARTICLE 273.

(مادة ٢٧٣) — و اذا تشاق الزوجان وخافا ان لا يقيما حدود الله (اي ما يلزمهما من حقوق الزوجية) فلا بأس بان تفتدي نفسها منه بمال يخلعهما به — [هداية جلد ثاني كتاب الطلاق صفحة ٣٨٤]

ايقاعه مباح — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٥٠٠]

الخلع هو ... ازالة ملك النكاح خرج به الخلع في النكاح الفاسد ... فانه لغو — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٤٠٦]

Hidaya, Vol. 2, p. 384 ; Radd-ul-Muhtâr, Vol. 2, pp. 450, 406.

ARTICLE 274.

(مادة ٢٧٤) — و شرطه كالطلاق - وهو اهلية الزوج و كون المرأة معالا للطلاق — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٠٥]

Radd-ul-Muhtâr, Vol. 2, p. 605.

ARTICLE 275.

(مادة ٢٧٥) — الخلقه فمثل ما اذا كان بغير عوض ايضاً — [البحر الرائق جلد رابع كتاب الطلاق صفحة ٧٨]

خرج ما لو قال خلعتك الخ — اي و لم يذكر المال لانه معنى كان على مال لزم قبولها — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٠٤]

Bahr-ul-Rayek, Vol. 4, p. 78 ; Radd-ul-Muhtâr, Vol. 2, p. 604.

ARTICLE 276.

(مادة ٢٧٦) — ولو اخذ الزيادة (على المهر) جاز في القضاء — [هداية
جلد ثاني كتاب الطلاق صفحة ٣٨٥]

Hidaya, Vol. 2, p. 385.

ARTICLE 277.

(مادة ٢٧٧) — وما جاز ان يكون مهرًا جاز ان يكون بدلًا في الخلع — [هداية
جلد ثاني كتاب الطلاق صفحة ٣٨٥]

Hidaya, Vol. 2, p. 385.

ARTICLE 278.

(مادة ٢٧٨) — وحكمه ان الواقع به ولو بلا مال ... طلاق بائن ... و ... ان
نوى الزوج ثلاثًا كان ثلاثًا — [طحطاوي جلد ثاني كتاب الطلاق صفحة ١٨٧]

حضرة السلطان ليس بشرط لـ — واز الخلع — [فتاوى عالمگیری جلد ثاني كتاب
الطلاق صفحة ١٣٧]

Tahtavi, Vol. 2, p. 187; Fatawa-i-Alamgiri, Vol. 2, p. 137.

ARTICLE 279.

(مادة ٢٧٩) — هويمين في جانبه لانه تعليق الطلاق بقبول المال فلا يصح
رجوعه عنه — (فلا يصح رجوعه الخ اي لو ابتدأ الزوج الخلع — ردالمحتار جلد ثاني
كتاب الطلاق صفحة ٦٠٥ - ٦٠٦)

قبل قبولها ... ولا يقتصر على المجلس ... فلا يبطل بقيامه عن المجلس قبل
القبول ... ويقتصر قبولها على مجلس علمها ... (فائدة) يشترط في قبولها علمها بمعناها —
[طحطاوي جلد ثاني كتاب الطلاق صفحة ١٨٦ - ١٨٧]

لو قال خلعتك ... (اي ولم يذكر المال) فانه يقع بائنا ... لعدم توقفه عليه (اي
على قبولها — طحطاوي جلد ثاني كتاب الطلاق صفحة ١٨٦)

فقرله لها خلعتك بلا ذكر مال .. طلاق بائن غير متوقف على قبولها بخلاف
ما اذا ذكر معه المال او كان بلفظ المفاعلة او الامر فانه لا بد من قبولها — [ردالمحتار
جلد ثاني كتاب الطلاق صفحة ٦٠٤]

Radd-ul-Muhtâr, Vol. 2, pp. 604, 605, 606; Tahtavi, Vol. 2, pp. 186, 187.

ARTICLE 280.

(مادة ٢٨٠) — اذا كان الابتداء منها بان قالت اخذت نفسي منك بكذا فلها ان ترجع عنه قبل قبول الزوج ويقتصر على المجلس - ويبطل بقيامها عن المجلس وبقيامه ايضاً ولا يذوق على ماوراء المجلس — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٠٦]

Radd-ul-Muhtâr, Vol. 2, p. 606.

ARTICLE 281.

(مادة ٢٨١) — ويسقط الغلخ والمباراة كل حق لكل واحد على الآخر مما يتعلق بالكاح حتى لو خالها او بارأها بمال معلوم كان للزوج ما سمت له ولم يبق لاحدهما قبل صاحبه دعوى في المهر مقبوضا كان او غير مقبوض قبل الدخول بها او بعده ... و شمل اول كلامه ستة عشر وجها لانه لا يخلو اما ان لا يسميا شيئاً او سميا المهر او بعضه او مالا آخر و كل وجه على وجهين اما ان يكون المهر مقبوضا اولاً و كل على وجهين اما ان يكون قبل الدخول او بعده — [البحر الرائق جلد رابع كتاب الطلاق صفحة ٩٤]
و ان سميا مالا آخر غير المهر فله المسمى و برئ كل منهما مطلقاً في الاحوال كلها — [البحر الرائق جلد رابع كتاب الطلاق صفحة ٩٦]

ويسقط الغلخ ... والمباراة ... كل حق — (كالمهر و المتعة ... ينبغي ان يحمل ... على ما اذا كان الغلخ او المباراة ... قبل الوطء لان المتعة حينئذ تجب لها عوضا عن المهر فتأخذ حكمه وهو السقوط بالغلخ او المباراة) — ثابت و قنهما لكل منهما على الآخر مما يتعلق بذلك الذكاح — فلا تطالبه بمهر ولا نفقة ماضية مفروضة — (و الملق في الحق فشمّل ... اللسوة — البحر الرائق جلد رابع كتاب الطلاق صفحة ٩٧)

ولا يطالب هو بنفقة عجلها ... ولم تمض مدتها ولا يطالب ايضاً بهو سلمه — [طحطاوي جلد ثاني كتاب الطلاق صفحة ١٩١]

فان لم يسميا شيئاً برئ كل منهما — [البحر الرائق جلد رابع كتاب الطلاق صفحة ٩٤]

Bahr-ul-Rayek, Vol. 4, pp. 94, 96, 97; Tahtavi, Vol. 2, p. 191.

ARTICLE 282.

(مادة ٢٨٢) — الثاني ان يصرح بنفي العوض فيه كما لو قال لها اخلي نفسك مني بغير شيء ... فلا يبرأ كل منهما عن حق صاحبه — [البحر الرائق جلد رابع كتاب الطلاق صفحة ٩٦]

Bahr-ul-Rayek, Vol. 4, p. 96.

ARTICLE 283.

(مادة ٢٨٣) — ان خالها على مهرها فان كانت المرأة مدخولا بها وقد قبضت مهرها يرجع الزوج عليها بمهرها وان لم يكن مقبوضا سقط عن الزوج جميع المهر... وان لم تكن مدخولا بها فان كانت قبضت مهرها وهو الف درهم رجع الزوج عليها... بلف وان لم تكن قبضت... يسقط المهر عن الزوج — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٣٨]

وان خالها على عشر مهرها ومهرها الف درهم فان كانت المرأة مدخولا بها والمهر مقبوضا رجع الزوج عليها بائة ويسلم لها الباقي... وان لم يكن المهر مقبوضا سقط من الزوج كل المهر... وان لم تكن المرأة مدخولا بها فان كان المهر مقبوضا رجع الزوج بعشر نصف المهر... وان لم يكن المهر مقبوضا بري الزوج عن جميع مهرها — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٣٨]

Fatawa-i-Alamgiri, Vol. 2, p. 138.

ARTICLE 284.

(مادة ٢٨٤) — واما نفقة العدة فلم تدخل تحت العموم... تسقط به وانما تسقط بالتخصيص... واما السكنى فلم يصح إسقاطها بحال... الا ان ابرأته عن مؤنة السكنى — [البحر الرائق جلد رابع كتاب الطلاق صفحة ٩٧]

Bahr-ul-Rayek, Vol. 4, p. 97.

ARTICLE 285.

(مادة ٢٨٥) — ولو هلك بدله في يدها قبل الرفع او استحق — (اي ادعاء آخر واثبت انه له) فعلية قيمته لو البدل قيميا ومثله لو مثليا — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٠٩]

Radd-ul-Muhtâr, Vol. 2, p. 609.

ARTICLE 286.

(مادة ٢٨٦) — شرط البرائة (اي في الخلع — طحاوي جلد ثاني كتاب الطلاق صفحة ١٩٢)

من نفقة الولد... (شمل العمل بان شرط براءته من نفقة اذا ولدته... وهي مؤنة الرضاع) ان وقتا... صح ولزم والا لا... و... لو كان الولد رضيع صح وان لم يوقنا... (وانما يصح على امسك الولد اذا بين العدة... ووجه الرواية... ان كونه رضيعاً قرينة على ارادة مدة الرضاع) ونصحه حولين بخلاف النظيم (اذا كان فطيميا فلا بد من التوقيت) — ولو تزوجها او عرت — (اي وترك الولد على الزوج) —

او ماتت او مات الولد — (وكذا لو لم يكن في بطنها ولد فيما اذا خالعه على ارضاع حملها اذا ولدته الى سنتين فتد قيمة الرضاع ولو قالت عشر سنين رجع عليها باجرة رضاع سنتين و نفقة باقي السنين) — رجع ببقية نفقة الولد ... الا اذا شوطت براءتها (اى وقت الخلع بموت الولد او موتها) — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۶۱۶-۶۱۵]

Tahtavi, Vol. 2, p. 192 ; Radd-ul-Muhtâr, Vol. 2, pp. 615, 616.

ARTICLE 287.

(ماده ۲۸۷) — لو اخذت على ان تمسكه الى البلوغ صح في الاثني لا الغلام ولو تزوجت فللزواج اخذ الولد وان انفقا على تركه ... وينظر الى مثل امساكه — (اى اجر مثل امساكه) — لتلك المدة فيرجع به عليها — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۶۱۶]

Radd-ul-Muhtâr, Vol. 2, p. 616.

ARTICLE 288.

(ماده ۲۸۸) — رجل خلع امرأته وبينهما ولد صغير على ان يكون الولد عند الاب سنين معلومة صح الخلع ويبطل الشرط لان كون الولد الصغير عند الام حق الولد — [فتاوى قاضى خان جلد ثاني كتاب الطلاق صفحہ ۲۵۷]
احق الناس بحضانة الصغير ... الام الا ان تكون الخ — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۱۶۵]

وتجب النفقة ... لطفله ... الفقير — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۷۲۷-۷۲۸]

وتستحق ... اجرة الحضانة اذا لم تكن منكحوة ولا معتدة ... وفي المبتوتة روايتان ... والفتوى على ان لها ذلك — [طحطاوي جلد ثاني كتاب الطلاق صفحہ ۲۴۴]

Fatawa-i-Kazi Khan, Vol. 2, p. 257 ; Fatawa-i-Alamgiri, Vol. 2, p. 165 ; Radd-ul-Muhtâr, Vol. 2, pp. 727, 728 ; Tahtavi, Vol. 2, p. 244.

ARTICLE 289.

(ماده ۲۸۹) — ولو خالعه على نفقة ولده ... وهي معسرة فطالبته بالنفقة يجبر عليها — لان بدل الخلع دين عليها فلا تسقط نفقة الولد بدين له عليها كما اذا كان له عليها دين آخر ... وافك ... ان الاب يرجع عليها بعد يسارها — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۶۱۶]

Radd-ul-Muhtâr, Vol. 2, p. 616.

ARTICLE 290.

(مادة ٢٩٠) — خلع الاب صغيرته بآلها او مهرها طلقت (اى بائنا) ولم يلزم المال (اى لا عليها ولا على الاب) ... فان خالها الاب على مال (شمل المهر) ضامنا له (اى ملتزما) ... صح والبال عليه (فان استعق لزمه قيمته) ... بل سقوط مهر ... لكن اذا كان على المهر فلها ان ترجع به على الزوج والزوج يرجع به على الاب — [رد المحتار جلد ثاني كتاب الطلاق صفحه ٦١٦ - ٦١٧]

Radd-ul-Muhtâr, Vol. 2, pp. 616, 617.

ARTICLE 291.

(مادة ٢٩١) — و ان شرطه اى الزوج الضمان (الاولى ان يقول اى الزوج بدل الخلع — طعطاوي جلد ثاني كتاب الطلاق صفحه ١٩٣)
عليها اى الصغيرة ... توقف على قبولها — فان قبلت وهي من اهلها (اى القبول — طعطاوي جلد ثاني كتاب الطلاق صفحه ١٩٣)

بان تعقل ان النكاح جالب والخلع سالب طلقت بلا شيء ... وان لم تقبل او لم تعقل لم تطلق وان قبل الاب ... ولو بلغت واجازت (اى اجازت قبول الاب)
جاز — [رد المحتار جلد ثاني كتاب الطلاق صفحه ٦١٨]

فان قبلت وهي عاقلة ... وقع الطلاق ... قلت ويقع كثيرا انه يطلقها بمقابلة ابرائها اياه من مهرها والظاهر انه يقع الرجعي لعدم سقوط المهر ... قال لامرأته الصبية انت طالق بمهرك فقبلت ينفي ان تطلق رجعيها ولا يسقط المهر — [رد المحتار جلد ثاني كتاب الطلاق صفحه ٦١٦ - ٦١٧]

Tahtavi, Vol. 2, p. 193 ; Radd-ul-Muhtâr, Vol. 2, pp. 616, 617, 618.

ARTICLE 292.

(مادة ٢٩٢) — لو خلع ابنه الصغير لا يصح ولا يتوقف خلع الصغير على اجازة الوالي — [رد المحتار جلد ثاني كتاب الطلاق صفحه ٦١٧]

Radd-ul-Muhtâr, Vol. 2, p. 617.

ARTICLE 293.

(مادة ٢٩٣) — هي غير رشيدة . (اى سفیهة — طعطاوي جلد ثاني كتاب الطلاق صفحه ١٩٣) ... فاخذت من زوجها مال جاز الخلع ... ولم يلزمها المال ... فان كان طلقها تطليقة على ذلك المال يملك رجعتها — [رد المحتار جلد ثاني كتاب الطلاق صفحه ٦١٧]

Tahtavi, Vol. 2, p. 193 ; Radd-ul-Muhtâr, Vol. 2, p. 617.

ARTICLE 294.

(مادة ٢٩٤) — خلع العريضة - اى مضى الموت (ان لو برئت منه كان الزوج كل البذل) — يعتبر من الثلث ... فله الاقل من ارثه وبذل الخلع ان خرج من الثلث والا فالاقل من ارثه و الثلث — (و العصل ان له الاقل من ميراثه ومن بدل الخلع ومن الثلث) ان ماتت في العدة ولو بعدها ... فله البذل ان خرج من الثلث ... فينظر الى البذل و الثلث فيعطي الاقل — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦١٩]

Radd-ul-Muhtâr, Vol. 2, p. 619.

ARTICLE 295.

(مادة ٢٩٥) — ولا يطالب الوكيل بالخلع بالبذل — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦١٧]

وان اضاف الوكيل البذل الى نفسه اضافة ملك او ضمان ... كان البذل على الوكيل... و للوكيل ان يرجع على المرأة — [طحطاوي جلد ثاني كتاب الطلاق صفحة ١٩٣]

Radd-ul-Muhtâr, Vol. 2, p. 617 ; Tahtavi, 2, p. 193.

ARTICLE 296.

(مادة ٢٩٦) — طلقني على ان اؤخر مالي عليك فطلقها فان كانت للتأخير غاية معلومة صح التأخير ان لم تكن لا يصح ... و يصح التأجيل في بدل الخلع مع جهالة مستدركة ... لا الفاحشة ... و حيث لا يصح التأجيل يجب المال حالا — [فتاوى عالمگیری جلد ثاني كتاب الطلاق ١٤٢]

Fatawa-i-Alamgiri, Vol. 2, p. 142.

ARTICLE 297.

(مادة ٢٩٧) — خرج به الخلع في النكاح الفاسد ... فانه لغو — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٠٤]

Radd-ul-Muhtâr, Vol. 2, p. 604.

CHAPTER III.

الباب الثالث في الفرقة بالعنة ونحوها

ARTICLE 298.

(مادة ٢٩٨) — فان علمت ... وقت النكاح انه عذيق (هو... من لا يقدر على جماع فرج زوجته — ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٤٣)

لا يكون لها حق الخصومة ... وان لم تعلم وقت النكاح وعلمت بعد ذلك كان لها حق الخصومة ولا يبطل حقها بترك الخصومة ... ما لم ترض بذلك — [فتاوى قاضيخان جلد اول كتاب الطلاق صفحة ١٨٦]

فلو وجدته عنيانا ... ولم تخاصم زمانا لم يبطل حقها ... كما لو رفعته ... ولم تخاصم زمانا — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٤٦ - ٦٤٧]

Radd-ul-Muhtâr, Vol. 2, pp. 643, 646, 647 ; Fatawa-i-Kazi Khan, Vol. 1, p. 186.

ARTICLE 299.

(مادة ٢٩٩) — اذا رفعت المرأة زوجها الى القاضي وادعت انه عنيان وطلبت الفقرة فان القاضي يسئل هل وصل اليها او لم يصل فان اقر انه لم يصل اجله سنة — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٥٥]

اجل سنة ... قمرية ... ورمضان وايام حيضها منها وكذا حجة وغيبته لا مدة حجها وغيبتها ومرضه ومرغها - اي مرضا لا يستطيع معه الوطى — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٤٥ - ٦٤٦]

ابتداء التأجيل من وقت المخاضة — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٥٥]

ان خاصته وهو معمر يؤجل بعد الاحلال ... ولو وجدت المرأة زوجها مريضا لا يقدر على الجماع لا يؤجل ما لم يصح — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٥٦]

ان وجدت ... زوجها الصغير عنيانا ينتظر بلوغه — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٥٧]

Radd-ul-Muhtâr, Vol. 2, pp. 645, 646 ; Fatawa-i-Alamgiri, Vol. 2, pp. 155, 156, 157.

ARTICLE 300.

(مادة ٣٠٠) — فان وطئ مرة فيها والا بانث بالتفريق من القاضي - (وهذا التفريق طلاق بائن) — ان ابى طلاقها بطلبها — اي طلبا ثانيا ... للتفريق — [طحاوي جلد ثاني كتاب الطلاق صفحة ٢١٢]

اذا وجدت المرأة زوجها مجنونا ... فرق ... بطلبها لو ... غيرعالمه بعاله قبل النكاح — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٤٣ - ٦٤٤]

Tukhtavi, Vol. 2, p. 212 ; Radd-ul-Muhtâr, Vol. 2, pp. 643, 644.

ARTICLE 301.

(مادة ٣٠١) — ولو ادعى الوطى واكرته — (هذا شامل لما قبل التأجيل وبعده) فان قالت امرأة ثقة — والثنان احوط — هي بكر ... خيرت في مجلسها وان قالت

هي ثيب او كانت ثيبا — (اى حين تزوجها) صدق بعقله فان نكل في الابتداء (اى قبل التأجيل) اجل وفي الانتهاء خبرت - كما يصدق لو وجدت ثيبا و زعمت زوال عذرتها بسبب آخر... وان اختارتها — (اى بعد تمام السنة) ... بطل حقها كما لو وجد منها دليل اعراض بان قامت من مجلسها او اقامها اعوان القاضي ... قبل ان تغتار شيئا — [ردالمحتار جلد ثاني كتاب الطلاق صفحه ٦٤٧ - ٦٤٨]

Radd-ul-Muhtār, Vol. 2, pp. 647, 648.

ARTICLE 302.

(مادة ٣٠٢) — ولوقراضيا — (اى العنين وزوجته) على الذكاح ثانيا بعد التفريق صح — [طحطاوي جلد ثاني كتاب الطلاق صفحه ٢١٣]
ولوفرق بين المريضة و زوجها لعنة ... لم يرثها الزوج — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحه ١٢٣]
فرق بالعنة ... في مرض الزوج ومات في عدتها لم ترثه — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحه ١٢٣ - ١٢٤]
وهذا التفريق طلاق بائن — [طحطاوي جلد ثاني كتاب الطلاق صفحه ٢١٢]
اذا كان الطلاق بائنا دون الثلث فله ان يتزوجها في العدة وبعد انقضائها — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحه ١٢٨]

Tahtavi, Vol. 2, pp. 212, 213; Fatawa-i-Alamgiri, Vol. 2, pp. 123, 124, 128.

CHAPTER IV.

الباب الرابع في الفرقة بالردة

ARTICLE 303.

(مادة ٣٠٣) — وارتداد احدهما اى الزوجين فسخ — (فلا ينقص عددا — اى عدد الطلاق) — عاجل بلا قضاء — [طحطاوي جلد ثاني كتاب النكاح صفحه ٨٤]

Tahtavi, Vol. 2, p. 84.

ARTICLE 304.

(مادة ٣٠٤) — العزومة بالردة غير مقابلة فانها ترتفع بالاسلام — [ردالمحتار جلد ثاني كتاب النكاح صفحه ١٢٥]

فلو ارتد مرارا و جدد الاسلام في كل مرة و جدد النكاح ... تعل امرأته من غير اصابة زوج ثان — [طحاوي جلد ثاني كذاب النكاح صفحة ٨٤]
و تجبر على الاسلام و على تجديد النكاح ... بهر يسير — [ردالمحتار جلد ثاني كذاب النكاح صفحة ١٢٥]

فيقع طلاقه عليها في العدة مستقبعا فائدته من حرمتها عليه بعد الثلاث حرمة مغيبة بوطى زوج آخر ... قلت وهذا اذا لم تلحق بدار الحرب ... فالمرتد اذا لحق بدار الحرب فطلق امرأته لا يقع — [ردالمحتار جلد ثاني كذاب النكاح صفحة ١٢٥]

Radd-ul-Muhtâr, Vol. 2, p. 425 ; Tahtavi, Vol. 2, p. 84.

ARTICLE 305.

(مادة ٣٠٥) — وبقي النكاح ان ارتدا معا ... او لم يعرف سبق ادهما على الآخر ثم اسلما كذلك ... وفسد ان اسلم ادهما قبل الآخر — [طحاوي جلد ثاني كذاب النكاح صفحة ٨٥]

Tahtavi, Vol. 2, p. 85.

ARTICLE 306.

(مادة ٣٠٦) — فللموطوءة و لو حكما كل مهرها — اطلقه فشمّل ارتداده و ارتدادها — [ردالمحتار جلد ثاني كذاب النكاح صفحة ١٢٥]

Radd-ul-Muhtâr, Vol. 2, p. 425.

ARTICLE 307.

(مادة ٣٠٧) — و لغيرها نصفه لو مسمى او المتعة — (اى ان لم يكن مسمى) لو ارتد ... و لا شيء من المهر ... لو ارتدت — [ردالمحتار جلد ثاني كذاب النكاح صفحة ١٢٥]

Radd-ul-Muhtâr, Vol. 2, p. 425.

ARTICLE 308.

(مادة ٣٠٨) — لو ارتد هو فانها ترثه مطلقا اذا مات ... وهي في العدة — [ردالمحتار جلد ثاني كذاب النكاح صفحة ١٢٥]

Radd-ul-Muhtâr, Vol. 2, p. 425.

ARTICLE 309.

(مادة ٣٠٩) — ولو ماتت في العدة ورثها زوجها المسلم — هذا اذا ارتدت وهي مريضة ثم ماتت ... بخلاف ردتها في الصحة — [ردالمحتار جلد ثاني كذاب النكاح صفحة ١٢٥]

Radd-ul-Muhtâr, Vol. 2, p. 425.

CHAPTER V.

الباب الخامس في العدة وفي نفقة المعتدة

SECTION I.

الفصل الاول فيمن تجب عليها العدة من النساء ومن لا تجب

ARTICLE 310.

(مادة ٣١٠) — وركنها حرمت ثابتة بها كعزمة تزوج — اى تزوجها غيره —
[رد المحتار جلد ثاني كتاب الطلاق صفحہ ٢٥٠]

وشرطها الفرقة [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٢٥٠]

اطلق الطلاق فشمّل البائن والرجعي ولم يقيد بالدخول بناء على اى الاصل
في النكاح الدخول ولا بد منه حقيقة او حكما حتى تجب على مطلقة بعد الخلوة
ولو فاسدة ... وشمّل جميع اسبابه من الفسخ بخيار البلوغ الخ — [البحر الرائق
جلد رابع كتاب الطلاق صفحہ ١٢٠]

لو كان النكاح فاسدا ففرق القاضي ان فرق قبل الدخول لا يجب العدة وكذا
لو فرق بعد الخلوة وان فرق بعد الدخول كان عليها الاعتداد — [فتاوى عالمگیری
جلد ثاني كتاب الطلاق صفحہ ١٥٧]

ان مبدأ العدة في النكاح الفاسد بعد التفريق ... او المتاركة ... وفي الوطى
بشبهة عند انتهاء الوطى — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٢٥٠]

هي انتظار مدة معلومة يلزم المرأة بعد زوال النكاح حقيقة او شبهة المتأكد بالدخول
او الموت — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ١٥٧]

*Radd-ul-Muhtâr, Vol. 2, p. 650; Bahrr-ul-Rayek, Vol. 4, p. 140;
Fatawa-i-Alamgiri, Vol. 2, p. 157;*

ARTICLE 311.

(مادة ٣١١) — وهي في حق حرة ولو كناية تحت مسلم — نعيض لطلاق ...
او فسخ بجميع اسبابه ... بعد الدخول حقيقة او حكما ... ثلاث حيض كوامل —
[رد المحتار جلد ثاني كتاب الطلاق صفحہ ٢٥٠ - ٢٥١]

وكذا موطوءة بشبهة ... او بنكاح فاسد — اى عدة كل منها ثلاث حيض —
في الموت والفرقة — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٢٥٢]

ومنها عدة النكاح الفاسد سببها تفريق القاضي او المتاركة وشرطها ان تكون بعد
الوطى حقيقة — [البحر الرائق جلد رابع كتاب الطلاق صفحہ ١٣٩]

ولا اعتداد ببعض طلقت فيه — أى إذا طلقها في العييض لا يحسب من العدة —
[رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٦٠]

Radd-ul-Muhtâr, Vol. 2, pp. 650, 651, 652, 660; Bahrr-ul-Rayek, Vol. 4, p. 139;

ARTICLE 312.

(مادة ٣١٢) — والعدة في حق من لم تعض ... لصغر ... أو كبر ... أو بلغت بالسن ... ولم تعض ... (شامل لما إذا لم ترد ما أصلا) ثلاثة أشهر بالاهلة لو في الغرة والا فبالأيام ... إذا اتفق عدة الطلاق والموت في غرة الشهر اعتبرت الشهر بالاهلة و ان نقصت من العدد و ان اتفق في وسط الشهر ... يعتبر بالأيام فتعد بالطلاق بتسعين يوما ...
[رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٥٢ - ٦٥٣]

Radd-ul-Muhtâr, Vol. 2, pp. 652, 653.

ARTICLE 313.

(مادة ٣١٣) — و الصغيرة ... إذا حاضت في اثنتائها ... (أى قبل تمامها) تستأنف بالعييض — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٥٨]
أيسة اعتدت بالأشهر ثم عاد دمها ... استأنفت بالعييض ... ان رأت قبل تمام الأشهر استأنفت لا بعدها ... و عليه فالنكاح جائز وتعد في المستقبل بالعييض — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٥٧ - ٦٥٨]

Radd-ul-Muhtâr, Vol. 2, pp. 657, 658.

ARTICLE 314.

(مادة ٣١٤) — و خرج بقوله و لم تعض الشابة الممتدة بالطهر بان حاضت — (أى ثلاثة أيام مثلا) — ثم اعتد طهرها — (أى سنة أو أكثر) — فتعد بالعييض إلى ان تبلغ سن الأياس — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٥٣]

Radd-ul-Muhtâr, Vol. 2, p. 653.

ARTICLE 315.

(مادة ٣١٥) — ممتدة الدم ... والمراد بها المتغيرة التي نسيت عادتها ... تنقضي عدتها بسبعة أشهر — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٥٣]

Radd-ul-Muhtâr, Vol. 2, p. 653.

ARTICLE 316.

(مادة ١١٦) — والعدة ... في حق الحامل مطلقا ... وضع جميع حملها ... والمراد به الحمل الذي استبان بعض خلقه أو كله فان لم يستبين بعضه لم تنقض العدة —
[رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٥٤ - ٦٥٥]

Radd-ul-Muhtâr, Vol. 2, pp. 654, 655.

ARTICLE 317.

(مادة ٣١٧) — والعدة للموت — (اى موت زوج العرة) اربعة اشهر... وعشر من الايام بشرط بقاء النكاح صحيحا الى الموت — مطلقا — وطئت او لا ولو صغيرة — (الاولى ولو كبيرة) — او كذائية تحت مسلم ... وفي حق امة تحيض لطلاق او فسخ حيضتان ... وفي امة لم تحض لطلاق او فسخ او مات عنها زوجها نصف العرة ... وفي ... الحامل مطلقا ولو امة ... وضع حملها — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٥٤ - ٦٥٥]

Radd-ul-Muhtâr, Vol. 2, pp. 654, 655.

ARTICLE 318.

(مادة ٣١٨) — ان الزوج اذا طلق زوجته طلاقا رجعيا في صحته او مرضه ودخلت في عدة الطلاق ثم مات والعدة باقية تنقل عدتها الى عدة الموت — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٥٦]

Radd-ul-Muhtâr, Vol. 2, p. 656.

ARTICLE 319.

(مادة ٣١٩) — وفي حق امرأة الفار ... (والمراد بامرأة الفار من ابائها في مرضه بغير رضاها) ... ان مات وهي في العدة ابعد الاجلين من عدة الوفاة وعدة الطلاق ... لانه وان انقطع النكاح ... لكنه باق ... في حق الارث ... بان تدربس اربعة اشهر وعشرا ... فيها ثلاث حيض — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٥٦]

Radd-ul-Muhtâr, Vol. 2, p. 656.

ARTICLE 320.

(مادة ٣٢٠) — نكح ... معتدته — (اى من طلاق بائن غير ثلاث) ... وطلقها قبل الوطء ... وجب عليه مهر تام و عليها عدة مبدأة — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٦٥]

Radd-ul-Muhtâr, Vol. 2, p. 665.

ARTICLE 321.

(مادة ٣٢١) — "ومبدأ العدة بعد الطلاق وبعد الموت على الفور و تنقضى العدة وان جهلت المرأة بهما اى بالطلاق و الموت — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٦١]

حتى لو لم تعلم و مضت مدة العدة فقد انقضت — [البحر الرائق جلد رابع كتاب الطلاق صفحة ١٥٧]

و مبدأها في النكاح الغامد بعد التفريق ... او الماتكة — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٦٣]

لو اقرب لاقها منذ زمان ماضي — فانها من وقت الاقرار ... ان كذبته ... لها النفقة ... وان صدقته ... لانفقة اى اذا كان الزمن الماضي استغرق العدة — اما اذا بقى منها شيء تجب النفقة — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٦٢]

و عرف ان تقيده بالاقرار يفيد ان الطلاق المتقدم اذا ثبت بالبيينة ينبغي ان تعتبر العدة من وقت قامت — [البحر الرائق جلد رابع كتاب الطلاق صفحة ١٥٨]

Radd-ul-Muhtár, Vol. 2, pp. 661, 662, 663 ; Bahrr-ul-Rayek, Vol. 4, pp. 157, 158.

ARTICLE 322.

(مادة ٣٢٢) — و تعد ان اى معتدة طلاق و مروت في بيت وجبت فيه — هوما يضاف اليهما بالسكنى قبل الفرقة ... ولا تخرجان منه الا ان تخرج — (الاولى الاثنيان بضمير التثنية فيه وفيما بعده) — او ينهدم المنزل او تخاف اهدامه او تلف مالها او لا تجد كراء البيت ... فنخرج — (اى معتدة الوفاة) — لا قرب موضع اليه وفي الطلاق الى حيث شاء الزوج — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٧٣ - ٦٧٤]

طلقت او مات ... في غير مسكنها عادت اليه فوراً — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٧٣]

ولا تخرج معتدة رجعي وبائن — (و الحق ان على المفتي ان ينظر في خصوص الوقائع فان علم في واقعة عجز هذه ... ان لم تخرج افناها بالعل وان علم قدرتها افناها بالحرمه) ... من بيتها اصلاً ... ومعتدة مروت تخرج ... وتبيت ... في منزلها — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٧٢ - ٦٧٣]

Radd-ul-Muhtár, Vol. 2, pp. 672, 673, 674.

ARTICLE 323.

(مادة ٣٢٣) — فعدة الاقراء لوجوبها اسباب منها الفرقة في النكاح الصحيح ... بعد وطئ او خلوة ومنها عدة النكاح الفاسد ... وشرطها ان تكون بعد الوطئ حقيقة — [البحر الرائق جلد رابع كتاب الطلاق صفحة ١٣٩]

Bahrr-ul-Rayek, Vol. 4, p. 139.

SECTION II.

الفصل الثاني في نفقة المعتدة

ARTICLE 324.

(مادة ٣٢٤) — فالعامل ان الفرقة اما من قبله او من قبلها فلو من قبله فلها النفقة مطلقا سواء كانت بمعصية او لا طلاقا او فسحا -- [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢٦]

وتجب لمطلقة الرجعي والبائن ... و اطلاق فشمّل العامل وغيرها والبائن بثلاث او اقل ... [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢٦]

ان الفرقة ... ان كانت من قبله فلها النفقة ... كلعانه و عنده ... او الاثاع مع عدم فيله ... او ابائه عن الاسلام — [البحر الرائق جلد رابع كتاب الطلاق صفحة ٢١٧] خالها على ان لا نفقة لها ولا سكنى فلها السكنى دون النفقة لان النفقة حقها فيصح لبراء عنها -- [البحر الرائق جلد رابع كتاب الطلاق صفحة ٢١٧]

والمباينة بالخلع والايلاء واللعان وردة الزوج ومجامعة امها في النفقة سواء — [فتاوى قاضيخان جلد اول كتاب النكاح صفحة ٢٠٠]

احترز عن معصيته كقبيله بنتها ... فان النفقة واجبة لها — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢٧] — ... اذا لم يكن بمعصية منه ولا منها كخيار بلوغ ... فان النفقة واجبة لها — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢٧]

Radd-ul-Muhtâr, Vol. 2, pp. 726, 727; Bahrr-ul-Rayek, Vol. 4, p. 217; Fatawa-i-Kazi Khan, Vol. 1, p. 200.

ARTICLE 325.

(مادة ٣٢٥) — وتجب ... للفرقة بلا معصية (اى من قبلها) كخيار ... بلوغ وتفريق بعدم كفاءة — ومثله عدم مهر المثل النفقة — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢٦]

تستحق النفقة ... امرأة العنين اذا اختارت الفرقة — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٥]

Radd-ul-Muhtâr, Vol. 2, p. 726; Fatawa-i-Alamgiri, Vol. 2, p. 175.

ARTICLE 326.

(مادة ٣٢٦) — وان كانت من جهة المرأة ... ان كانت بمعصية لا نفقة لها — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٥]

وان اردت او طارعت ابن زوجها او اباه او لمسته بشهوة فلا نفقة لها — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٥]
وتجب السكنى ... لمعددة ورقة بمعصيتها (الا اذا خرجت من بيته فلا سكنى لها في هذه الفرقه) ... لا غيرها — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢٧]
وهذا كله فيما بعد الدخول اما قبله فلا نفقة لعدم العدة — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢٦]

Fatawa-i-Alamgiri, Vol. 2, p. 175 ; Radd-ul-Muhtâr, Vol. 2, pp. 726, 727.

ARTICLE 327.

(ماده ٣٢٧) — كل من بطلت نفقتها بالفرقة لا تعود النفقة اليها في العدة وان زال سبب الفرقة — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٥]
فان اسلمت المرتدة و العدة باقية فلا نفقة لها بغلاف ما لو نشرت فطلقها ثم تركت النشوز فلها النفقة — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٥]
ولو طلقها وهي ناشزة فلها ان تعود الى بيت زوجها وتأخذ النفقة — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٥]

Fatawa-i-Alamgiri, Vol. 2, p. 175.

ARTICLE 328.

(ماده ٣٢٨) — لو كانت صغيرة يجامع مثلها فطلقها بعد ما دخل بها انفق عليها ثلثة اشهر فان حاضت فيها واستقبلت عدة الاقراء انفق عليها حتى تنقضى عدتها . . . [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٥]
فان طال العدة بارتفاع الحيض كان لها النفقة الى ان تصير آيسة وينقضى عدتها بالاشهر — [فتاوى قاضيخان جلد اول كتاب النكاح صفحة ٢٠٠]

Fatawa-i-Alamgiri, Vol. 2, p. 175 ; Fatawa-i-Kazi Khan, Vol. 1, p. 200.

ARTICLE 329.

(ماده ٣٢٩) — المعددة اذا لم تخاصم في نفقة العدة حتى انقضت عدتها لا نفقة لها وكذا لو كان القاضي فرض لها نفقة العدة فلم تأخذ ... وانقضت العدة ... تسقط النفقة — [فتاوى قاضيخان جلد اول كتاب النكاح صفحة ٢٠١]

Fatawa-i-Kazi Khan, Vol. 1, p. 201.

ARTICLE 330.

(ماده ٣٣٠) — ولا تسقط النفقة المفروضة بمضى العدة ... صرحوا بان النفقة تجب بالقضاء او الرضاء — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٢٦]

Radd-ul-Muhtâr, Vol. 2, p. 726.

ARTICLE 331.

(مادة ٣٣١) — لا تجب النفقة بأنواعها (للمتوفى عنها زوجها سواء كانت حاملا او حائلا الا اذا كانت ام ولد — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۱۷۵ — رد المحتار جلد ثاني كتاب الطلاق صفحہ ۷۲۶]

Fatawa-i-Alamgiri, Vol. 2, p. 175; Radd-ul-Muhtâr, Vol. 2, p. 726.

BOOK IV.

الكتاب الرابع في الاولاد

CHAPTER I.

الباب الاول في ثبوت النسب

SECTION I.

الفصل الاول في ثبوت نسب الولد المولود في حال قيام النكاح الصحيح

ARTICLE 332.

(مادة ٣٣٢) — واكثر مدة العمل سنتان واقلها ستة اشهر — [شرح الوقايه
جلد ثاني كتاب الطلاق صفحه ١٥٢]

Sharh-i-Vikaya, Vol. 2, p. 152.

ARTICLE 333.

(مادة ٣٣٣) — ويثبت نسب ولد ... منكوحه انت به لسته اشهر... ولاقل
منها لا يثبت — [شرح الوقايه جلد ثاني كتاب الطلاق صفحه ١٤٣ - ١٥٠ - ١٥١]
Sharh-i-Vikaya, Vol. 2, pp. 143, 150, 151.

ARTICLE 334.

(مادة ٣٣٤) — ويثبت نسب ولد ... منكوحه انت به لسته اشهر اى من وقت
النكاح اقر به الزوج او صكت — [شرح الوقايه جلد ثاني كتاب الطلاق صفحه ١٤٣ -
١٥٠]
Sharh-i-Vikaya, Vol. 2, pp. 143, 150.

ARTICLE 335.

(مادة ٣٣٥) — شرطه ان يكونا زوجين و ان يكون النكاح بينهما صحيحا ...
(ولو طلقها طلاقا رجعيا ثم قذفها يجب اللعان) اهله ... من كان اهلا للشهادة
(اى لادائها — عمدة الرعايه حاشيه شرح وقايه جلد ثاني كتاب الطلاق صفحه ١٢٦)

حتى ان اللعان لا يجري بين الزوجين ... اذا كانا محدودين في القذف ... او
كانا رقيقين ... او كافرين ... او احرسين ... او صيبين ... او مجنونين ... و يجري
فيما عدا ذلك — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٥١]
واقصر على كون الزوجة عفيفة — [شرح الوقاية جلد ٥ ثاني كتاب الطلاق
صفحة ١٢٩]

اذا التعنا فرق الحاكم بينهما — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٥٢]
و لو قذفها بالزنا ونفى الولد ذكر في اللعان الامرين ثم ينفي القاضي نسب الولد
و يلحقه بامه — [هداية جلد ثاني كتاب الطلاق صفحة ٣٩٩]

سقط اللعان بوجه من الوجوه فانه لا ينتفي النسب ... و ... اذا كان من اهل اللعان
فلم يتلأعنا فانه لا ينتفي النسب — [فتاوى عالمگیری جلد ثاني كتاب الطلاق
صفحة ١٥٣]

فان ابى حبس حتى ... يكذب نفسه فيعبد للقذف ... وان اكدب نفسه ... (اى
اذا اكدبها بعد اللعان) حد للقذف — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٣٧ -
٦٤٠]

Umdat-ul-Ri'ayah, p. 126 ; *Fatawa-i-Alamgiri*, Vol. 2, pp. 151, 152, 153 ;
Sharh-i-Vikaya, Vol. 2, p. 126 ; *Hidayah*, Vol. 2, p. 399 ; *Radd-ul-Muhtâr*,
Vol. 2, pp. 637, 640.

ARTICLE 336.

(مادة ٣٣٦) — نفى الولد ... عند التهنئة ومدتها سبعة ايام عادة (اشار به الى انه
لم يقدّر زمنها بشئ) و عند ابتداء آلة الولادة صح ... و لو غائبا فعالة علمه كحالة
ولادتها — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٤١]

Radd-ul-Muhtâr, Vol. 2, p. 641.

ARTICLE 337.

(مادة ٣٣٧) — و اما شروط النفي فستة ... الاول التفريق — الثاني ان يكون عند
الولادة او بعدها يوم او يومين — الثالث ان لا يتقدم منه اقارب به ولو دلالة ... الرابع
حيوة الولد وقت التفريق — الخامس ان لا تلد بعد التفريق ولد آخر من بطن واحد —
السادس ان لا يكون محكوما بثبوته شرعا كان ولدت ولدا فانقلب على رضيع فمات الرضيع
وقضى بدينه على عاقلة الاب — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٤٠]

Radd-ul-Muhtâr, Vol. 2, p. 640.

ARTICLE 338.

(مادة ٣٣٨) — و به علم ان نفية يخرجها عن كونه عصبة ... و صرحوا ببقاء نسبه
بعد القطع في كل الاحكام ... الا في ... الارث و النفقة فقط — فيبقى النسب بين الولد

و الملائن في حق الشهادة و الزكوة و القصاص و النكاح و عدم الملعوق بالغير حتى لا تجوز شهادة احدهما للآخر و لا صرف زكوة ماله اليه و لا يجب القصاص على الاب بقتله و لو كان لابن الملائنة ابن و للزوج بنت من امرأة أخرى لا يجوز للابن ان يتزوج بتلك البنت و ... لا تصح دعوة غير النافي — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۶۴۲ - ۶۴۳]

Radd-ul-Muhtâr, Vol. 2, pp. 642, 643.

ARTICLE 339.

(ماده ۳۳۹) — و لو ماتت بنته المنفیه عن ولد فادعاء فنسبه غير ثابت منه ... و ... الولد المنفی لو كان ذكرا فمات و ترك ولدا ثبت نسبه من المدعي و ورث الاب منه — [البحر الرائق جلد رابع كتاب الطلاق صفحہ ۱۳۰]

Bahr-ul-Rayek, Vol. 2, p. 130.

ARTICLE 340.

(ماده ۳۴۰) — فان التعلنا ... بانث بتفريق الحاكم — اى تكون الفرقة تطليقة بائنة — فينوارثان قبل تفريقه . لانها امرأته ما لم يفرق القاضي بينهما ... نعم يحرم الوطى و دواعيه ... (فان الفرقة باللعان ... توجب حرمة الاجتماع و التزوج مادام على حال اللعان — البحر الرائق جلد رابع كتاب الطلاق صفحہ ۱۳۰ - ۱۳۱)

لما مر ... من حديث المتلاعنان لا يجتمعان ابدا ... و ... له تزوجها اذا خرجا او احدهما عن اهلية اللعان — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۶۳۹ - ۶۴۰] و اذا كان الطلاق بائنا دون الثلث فله ان يتزوجها فى العدة و بعد انقضائها — [هداية جلد ثاني كتاب الطلاق صفحہ ۳۷۹]

Bahr-ul-Rayek, Vol. 2, pp. 130, 131; Radd-ul-Muhtâr, Vol. 2, pp. 639, 640; Hidayah, Vol. 2, p. 379.

SECTION II.

الفصل الثاني في ثبوت نسب الولد المولود من نكاح فاسد

او من الوطى بشبهة في نكاح فاسد

ARTICLE 341.

(ماده ۳۴۱) — و ... يثبت النسب ... بلا دعوة و تعتبر مدته و هي ستة اشهر (اى فاكثر ... التقدير باقل مدة العمل انما هو للاحتراز عما دونه لا عما زاد) من الوطى (اى اذا لم تقع الفرقة) فان كانت منه الى الوضع اقل مدة العمل يعنى ستة اشهر فاكثر يثبت النسب — [رد المحتار جلد ثاني كتاب النكاح صفحہ ۳۸۱]

ثم ان محل ثبوت النسب فيه اذا اتت به لاقل من سنتين من وقت المفارقة لا
لاكثر منهما — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۶۷۶]
Radd-ul-Muhtâr, Vol. 2, pp. 381, 676.

ARTICLE 342.

(ماده ۳۴۲) — اذا جائت به المبتوتة لاكثر و ادعاء الزوج يثبت نسبه منه لانه
الخ ... وهذا اولى من حمل بعضهم ... على المبانة بالكنايات فان الشبهة فيها شبهة
المحل — [البدر الرائق جلد رابع كتاب الطلاق صفحہ ۱۷۲]
وانما يثبت اذا كان الوطني بشبهة في المحل او بشبهة في العقد — [عمدة الرعاية
حاشية شرح وقايه جلد ثاني كتاب الطلاق صفحہ ۱۴۵]
ثبوت النسب لوجود شبهة العقد ... من وطئ امرأة زنت اليه وقيل له انها امرأتك
فهي شبهة في الفعل و ان النسب يثبت اذا ادعاء — [رد المحتار جلد ثاني كتاب الطلاق
صفحہ ۶۷۷]

*Bahrr-ul-Rayek, Vol. 2, p. 172; Umdat-ul-Riaya, Vol. 2, p. 145;
Radd-ul-Muhtâr, Vol. 2, 677.*

ARTICLE 343.

(ماده ۳۴۳) — ولو زنى بامرأة فحملت ثم تزوجها فولدت ان جائت به لستة
اشهر ... ثبت نسبه وان جاءت به لاقل من ستة اشهر لم يثبت نسبه الا ان يدعيه
و لم يقل انه من الزنى — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۱۶۵]
Fatawa-i-Alamgiri, Vol. 2, p. 165.

SECTION III.

الفصل الثالث في ولد المطلقة و المتوفى عنها زوجها

ARTICLE 344.

(ماده ۳۴۴) — فيثبت نسب ولد معتدة الرجعي ... و ان ولدت لاكثر من سنتين
ولو لعشرين سنة فاكثر ... ما لم تقر بمضى العدة ... وكانت ... رجعة ... في الاكثر
منها ... لا في الاقل ... و ان ثبت نسبه ... كما يثبت ... في مبتوتة جاءت به لاقل
منها ... و لم تقر بمضيها ... ولو لتماهما لا يثبت النسب ... الا بدعوه — [رد المحتار
جلد ثاني كتاب الطلاق صفحہ ۶۷۶ - ۶۷۷]

ويثبت نسب ولد معتدة الموت لاقل منها من وقته الى الموت ... و لم تقر بانقضاء
عدتها ... و ان ولدت لاكثر منها من وقته لا يثبت — [رد المحتار جلد ثاني كتاب الطلاق
صفحہ ۶۷۸]

Radd-ul-Muhtâr, Vol. 2, pp. 676, 677, 678.

ARTICLE 345.

(مادة ٣٤٥) — وكذا المقررة بمضيها (اى) يثبت نسب ولدها ... سواء كانت معتدة بائن اورجعي او وفاة (والمدة تحتله — ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٦٧٦) لولاقل من اقل مدته من وقت الاقرار ولاقل من اكثرها ... (اى) اكثر مدة العمل اى ولاقل من سنتين من وقت الفراق) والا لا يثبت — اى و ان لم تلد لاقل من ستة اشهر بان ولدته ... لاقل منهما ولاكثر من سنتين من وقت البت — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٦٧٨ - ٦٧٩]

Radd-ul-Muhtâr, Vol. 2, pp. 678, 679.

ARTICLE 346.

(مادة ٣٤٦) — ويثبت نسب ولد المطلقة ... المرافقة المدخول بها ... غير المقررة بانقضاء عدتها ... اذا لم تدع حبلا ... لاقل من تسعة اشهر مذ طلقها ... والا لا — اى وان لم يكن لاقل بل ولدته لتسعة اشهر فاكثر فانه لا يثبت نسبه — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٦٧٧ - ٦٧٨]

وكذا المقررة ان ولدت لذلك — اى لاقل من ستة اشهر من وقت الاقرار ... ولاقل من تسعة اشهر من وقت الطلاق — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٦٧٨]

فلو ادعت حبلا ... يثبت اذا ولدته لاقل من سنتين لو الطلاق بائنا ولاقل من سبعة وعشرين شهرا لورجعيًا — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٦٧٨]

Radd-ul-Muhtâr, Vol. 2, pp. 677, 678.

ARTICLE 347.

(مادة ٣٤٧) — اما الصغيرة (اى) التي لم تقر بالعجل ولا بانقضاء العدة (فان ولدت لاقل من عشرة اشهر وعشرة ايام ثبت والا لا — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٦٧٨]

الصغيرة اذا توفي عنها زوجها فان اقوت بالعجل فهي كالكبيرة يثبت نسبه منه الى سنتين ... و ان اقوت بانقضاء عدتها ... ثم ولدت لسنة اشهر فصاعدا لم يثبت النسب منه — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ١٦٣ - ١٦٤]

Radd-ul-Muhtâr, Vol. 2, p. 678; Fatawa-i-Alamgiri, Vol. 2, pp. 163, 164.

SECTION IV.

الفصل الرابع في دعوى الولادة والاقرار بالابوة والبنوة والاخوة وغيرها واثبات ذلك

ARTICLE 348.

(مادة ٣٤٨) — فان جحد الولادة يثبت بشهادة امرأة واحدة — [هداية جلد ثاني كذاب الطلاق صفحة ١٤٢]

قيدها ... بالعدالة وقيدها ... بالحرية والاسلام — [البحر الرائق جلد رابع كتاب الطلاق صفحة ١٧٦]

أنكر تعيين الولد فانه يثبت تعيينه بشهادة القابلة — [البحر الرائق جلد رابع كتاب الطلاق صفحة ١٧٥]

Hidayah, Vol. 2, p. 412; Bahrr-ul-Rayek, Vol. 4, pp. 175, 176.

ARTICLE 349.

(مادة ٣٤٩) — ويثبت نسب ولد المعقدة بموت او طلاق — اى بائن او رجعي (شامل للمطلقة رجعيا وفيه اذا جاءت به لاكثر من سنتين اشكال... والعق انها ان جاءت به لاقبل من سنتين احتج الى الشهادة كالبائن — طحطاوي جلد ثاني كذاب الطلاق صفحة ٢٣٥) ان جحدت (بالبناء للمجهول والفاعل الورثة في الموت والزوج في الطلاق) ولادتها بعجة تامة... او حبل ظاهر... او اقرار الزوج به — بالحبل ولو انكر تعيينه تكفي شهادة القابلة... او تصديق... الورثة — [ردالمحتار جلد ثاني كذاب الطلاق صفحة ٦٧٩ - ٦٨٠]

Tahtavi, Vol. 2, p. 235; Radd-ul-Muhtâr, Vol. 2, pp. 679, 680.

ARTICLE 350.

(مادة ٣٥٠) — وان اقر لغلام مجهول النسب... و هما في السن بحيث يولد مثله لمثله انه ابنه وصدقه الغلام لو صميرا (يعبر عن نفسه — البحر الرائق جلد سابع كتاب الاقرار صفحة ٢٧٨)

(اولم يصدق — البحر الرائق جلد سابع كتاب الاقرار صفحة ٢٧٨) ... ثبت نسبه ولو المقر مريضا و اذا ثبت شارى الغلام الورثة — [ردالمحتار جلد رابع كتاب الاقرار صفحة ٥١١]

و يصح... حتى يلزمه اى المقر الاحكام من النفقة والعضانة — [ردالمحتار جلد رابع كتاب الاقرار صفحة ٥١٢]

Bahrr-ul-Rayek Vol. 7, p. 278; Radd-ul-Muhtâr, Vol. 4, pp. 511, 512.

ARTICLE 351.

(مادة ٣٥١) — وكذا صح (اى اقرارها) بالولد ان شهدت امرأة ... (وافاد انها ذات زوج) ولو معدة جعدت ولادتها فبعدة تامة ... او صدقها الزوج ان كان لها زوج او كانت معدة منه وصح مطلقا ان لم تكن كذلك اى مزوجة ولا معدة او كانت مزوجة و ادعت انه من غيره ... ولا بد من تصديق هؤلاء الا في الولد اذا كان لا يعبر عن نفسه — [ردالمحتار جلد رابع كتاب الاقرار صفحة ٥١٢]

Radd-ul-Muhtâr, Vol. 4, p. 512.

ARTICLE 352.

(مادة ٣٥٢) ... صح اقراره ... بالوالدين ... بالشروط الثلاثة المتقدمة في الابن — [الدرالمختار جلد ثالث كتاب الاقرار صفحة ٨٧]

Durrul-Mukhtâr, Vol. 3, p. 87.

ARTICLE 353.

(مادة ٣٥٣) — ومن مات ابوه فاقرباؤه لم يثبت نسب اخيه ... ويشاركه في الميراث — [هداية جلد ثالث كتاب الاقرار صفحة ٢٢٨ - ٢٢٩]

ولو اقر... بنسب ... على غيره ... كالاخ ... لا يصح ... في حق غيره الا ... لو صدقه المقر عليه او الورثة ... ويصح في حق نفسه حتى يلزمه ... الارث — [ردالمحتار جلد رابع كتاب الاقرار صفحة ٥١٢]

ومن مات ابوه فاقرباؤه شاركه في الارث فيستحق نصف نصيب المقر — [ردالمحتار جلد رابع كتاب الاقرار صفحة ٥١٣]

Hidayah, Vol. 3, pp. 228, 229 ; Radd-ul-Muhtâr, Vol. 4, pp. 512, 513.

ARTICLE 354.

(مادة ٣٥٤) ... و شرط ان لا يكون له نسب معروف لانه يمنع ثبوته من غيره — [هداية جلد ثالث كتاب الاقرار صفحة ٢٢٧]

Hidayah, Vol. 3, p. 227.

SECTION V.

الفصل الخامس في احكام اللقيط

ARTICLE 356.

(مادة ٣٥٦) — اللقيط ... هو ... اسم لحي مولود طرحة اهله خوفا من العيلة او فرارا من تهمة الريبة — مضيعه اثم ومحرزة غايم التقاطه فرض ... ان غلب على ظنه هلاكه لو لم يرفع ... والا فمندوب لما فيه من الشفقة و الاحياء ... و ينبغي ان يحرم طرحة بعد التقاطه — [ردالمحتار جلد ثالث كتاب اللقيط صفحة ٣٤١ - ٣٤٢]

Radd-ul-Muhtâr, Vol. 3, pp. 341, 342.

ARTICLE 357.

(مادة ٣٥٧) — وهو حر (أى في جميع احكامه) مسلم ... و ... يصير مسلما في ثلاث صور وذميا في صورة واحدة وهي ما لو وجد ذمي في مكانهم — [ردالمحتار جلد ثالث كتاب اللقيط صفحة ٣٤٢ - ٣٤٥]

Radd-ul-Muhtâr, Vol. 3, pp. 342, 345.

ARTICLE 358.

(مادة ٣٥٨) — وليس لاحد اخذ منه قهرا و ... لا ينبغي للامام ان يأخذ من الملتقط الا بسبب يوجب ذلك — [ردالمحتار جلد ثالث كتاب اللقيط صفحة ٣٤٢ - ٣٤٣] — و ... يفتقر منه اذا لم يكن اهلا لحفظه — [ردالمحتار جلد ثالث كتاب اللقيط صفحة ٣٤٢]

لو وجد مسلم و كافر فتنازعا قضى به للمسلم ... ولو استويا — (أى في صفات الترجيع كلها) — فالراى للقاضي — [ردالمحتار جلد ثالث كتاب اللقيط صفحة ٣٤٣]

Radd-ul-Muhtâr, Vol. 3, p. 343.

ARTICLE 359.

(مادة ٣٥٩) — و ان وجد معه مال فهو له ... فيصرفه الواجد ... اليه باموالقاضي — [ردالمحتار جلد ثالث كتاب اللقيط صفحة ٣٤٥]
و ان انفق الملتقط عليه من مال نفسه يكون منطوعا لا يرجع بذلك على اللقيط و ان امره القاضي ان ينفق عليه من ماله على ان يكون ذلك دينا على اللقيط فما انفق يكون دينا على اللقيط — [فتاوى قاضيهان جلد رابع كتاب اللقيط صفحة ٣٥٩]

Radd-ul-Muhtâr, Vol. 3, p. 345 ; Fatawa-i-Kazi Khan, Vol. 4, p. 359.

ARTICLE 360.

(مادة ٣٦٠) — و يدفع في حرفة (ينبغي ان يقال ... انه يعلم العلم أولا فان لم يجد فيه قابلية سلمه لحرفة) و يقبض ... ما وهبه له الغير او تصدق به عليه ... وليس له حنثه ... وله نقله حيث شاء ... ولا ينفذ للملتقط عليه نكاح ... و ... لا يجوز ان يؤجره ليأخذ الاجرة لنفسه — [رد المحتار جلد ثالث كتاب اللقيط صفحة ٣٤٥]
وله ... شراء ما لابد له منه كالطعام و الكسوة ... ولا تصرفه في مال الملتقط — [هداية جلد ثاني كتاب اللقيط صفحة ٥٩٣]

Radd-ul-Muhtâr, Vol. 3, p. 345 ; Hidayah, Vol. 2, p. 593.

ARTICLE 361.

(مادة ٣٦١) — و يثبت نسبه من واحد بمجرد دعواه و لو غير الملتقط ... لو حيا و الا — (أى و ان كان اللقيط ميتا و ترك مالا او لم يترك) فبالبينة ... و يثبت نسبه من

ذمي و ... هو مسلم ... والمسئلة رباعية لانك إما ان يعده مسلماً في مكاننا ... او كافر في مكانهم ... او كافر في مكاننا او عكسه ... و ... يصير مسلماً في ثلاث صور و ذمياً في صورة واحدة و هي ما لو وجد ذمي في مكانهم — [رد المحتار جلد ثالث كتاب اللقيط صفحہ ۳۴۳ - ۳۴۴ - ۳۴۵]

Radd-ul-Muhtâr, Vol. 3, pp. 343, 344, 345.

ARTICLE 362.

(ماده ۳۶۲) — و ثبت نسبہ ... من اذنين مستويين — اى اذا ادعاه معا فلو سبق احدهما فهو ابنه ما لم يبرهن الآخر ... و ... يقدم ... المسلم على الذمي ... و ان ادعاه خارجان و وصف احدهما علامة به ... و وافق فهو احق اذا لم يعارضها أقوى منها كبيئته الآخر ... و سبقه — [رد المحتار جلد ثالث كتاب اللقيط صفحہ ۳۴۳ - ۳۴۴]

Radd-ul-Muhtâr, Vol. 3, pp. 343, 344.

ARTICLE 363.

(ماده ۳۶۳) — ولو ادعته امرأة ... ذات زوج فان صدقها زوجها او شهدت لها القابلة او قامت بينة و لورجلا و امرأتين ... صحت دعوتها و ... يلزم من ثبوتها منها ثبوت منه ... و ان لم يكن لها زوج فلا بد من شهادة رجلين — [رد المحتار جلد ثالث كتاب اللقيط صفحہ ۳۴۳ - ۳۴۴]

Radd-ul-Muhtâr, Vol. 3, pp. 343, 344.

ARTICLE 364.

(ماده ۳۶۴) — و ما يحتاج اليه من نفقة و كسوة و سكنى و دواء و مهر اذا زوجها السلطان (او وكيله) في بيت المال ان يبرهن على النفاذه و ان كان له مال ... ففي ماله ... و ارثه و لودية في بيت المال كجائته — [رد المحتار جلد ثالث كتاب اللقيط صفحہ ۳۴۲]

Radd-ul-Muhtâr, Vol. 3, p. 342.

CHAPTER II.

الباب الثانى فيما يجب للولد على الوالدين

ARTICLE 365.

(ماده ۳۶۵) — فيحتاج ... الى من يقوم بماله حتى لا يلحقه الضرر ... فالولاية في المال جعلت الى الاب ... و ... الاب يجبر على نفقته ... و يجب عليه

امسكه وحفظه ومباينته اذا استغنى عن النساء — [البهر الرائق جلد رابع كتاب الطلاق صفحة ١٨٠]

وليس على امه ارضاعه الا اذا تعينت — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٣٢]

Bahr-ul-Rayek, Vol. 4, p. 180 ; Radd-ul-Muhtâr, Vol. 2, p. 732.

SECTION I.

الفصل الاول في الرضاعة

ARTICLE 366.

(مادة ٣٦٦) — وليس على امه ارضاعه ... الا اذا تعينت فتجبر — بان لم يجد الاب من ترضعه او كان الولد لا يأخذ ثدى غيرها ... وان لم يكن للاب ولا للولد مال تجبر الام على ارضاعه — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٣٢]

Radd-ul-Muhtâr, Vol. 2, p. 732.

ARTICLE 367.

(مادة ٣٦٧) — ويستأجر الاب من ترضعه عندها (اى عند الام) — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٣٢]

Radd-ul-Muhtâr, Vol. 2, p. 732.

ARTICLE 368.

(مادة ٣٦٨) — لا يستأجر الاب امه لو منكوحة ... او معتدة رجعي و جاز ... استيجار منكوحة لولده من غيرها — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٣٣]

Radd-ul-Muhtâr, Vol. 2, p. 733.

ARTICLE 369.

(مادة ٣٦٩) — المعتدة عن طلاق بائن ... تستحق اجرة الرضاعة ... وان مضت عدتها فاستأجرها لارضاع ولدها جاز — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٧]

Fatawa-i-Alamgiri, Vol. 2, p. 177.

ARTICLE 370.

(مادة ٣٧٠) — وهي احق بارضاع ولدها بعد العدة اذا لم تطلب زيادة على ما تأخذه الاجنبية و لودون اجر المثل (اى ولو كان الذي تأخذه الاجنبية دون اجر المثل و طلبت الام اجر المثل فالاجنبية الاولى) بل الاجنبية المتبرعة احق منها ... اى

فى الارضاع — (فعند ذلك يستأجر الاب له من يرضعه عندها — طحاوي جلد ثاني كتاب الطلاق صفحہ ۲۷۶)

و... للام اخذ اجرة المثل على العضانة ولا تكون الاجنبية المنبرعة بها اولى نعم لو تبرعت العمة (ان العمة غير قيد بل مثلها بقية المعارم) — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۶۸۹]

بعضانته من غير ان تمنع الام عنه و الاب معسر فيقال للام اما ان تمسكي الولد بلا اجر و اما ان تدفعيه اليها — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۷۳۳]

Tahtavi, Vol. 2, p. 276; Radd-ul-Muhtâr, Vol. 2, p. 689, 733.

ARTICLE 371.

(ماده ۳۷) — و للام اجرة الارضاع بلا عقد اجارة — بل تستحقه بالارضاع فى المدة مطلقا ... و... القاضي ... يأمر بدفع ذلك اليها ... و... مدة الرضاع فى حق الاجرة حوالان — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۷۳۴]

Radd-ul-Muhtâr, Vol. 2, p. 734.

ARTICLE 372.

(ماده ۳۷۲) — و حكم الصالح كالاستئجار — يعنى لو صالحت زوجها عن اجرة الرضاع على شيء ان كان الصالح حال قيام النكاح او فى عدة الرجعي لا يجوز و ان كان فى عدة البائن بواحدة او ثلاث جاز — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۷۳۴]

Radd-ul-Muhtâr, Vol. 2, p. 734.

ARTICLE 373.

(ماده ۳۷۳) — ما تأخذ الام من الاب ... بمقابلة ارضاع الولد هو اجرة ... فاذا مات الاب لا تسقط هذه الاجرة بموته بل تعجب لها فى تركته و تشارك غرماءه — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۷۳۴]

Radd-ul-Muhtâr, Vol. 2, p. 734.

ARTICLE 374.

(ماده ۳۷۴) — و ... الظئر تجبر على ابقاء الاجارة ... من استئجر ظئر الصبي شهرا فلما انقضى الشهر ابت ان ترضعه و الصبي لا يقبل ثدى غيرها ... اجبرها ان ترضع — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۷۳۲]

ولا يلزم الظئر المكث عند الام ما لم يشترط فى العقد — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۷۳۲]

Radd-ul-Muhtâr, Vol. 2, p. 732.

SECTION II.

الفصل الثاني في مقدار الرضاع الموجب لتحريم النكاح

ARTICLE 375.

(مادة ٣٧٥) — الرضاع هو ... مص من ثدى آدمية ... والعق بالخص والوجور والسعوط في وقت مخصوص هو ... دوران ... ويثبت التحريم في المدة فقط ولو بعد ... الاستغناء بالطعام ... ويثبت به ... وان قل ان علم وصوله لجوفه من فمه او انفه لا غير (ولا الاحتقان والاقطار في اذن وجائفة وامة — [طحطاوي جلد ثاني كتاب النكاح صفحة ٩٣]

فلو التقم الحلمة ولم يدر ادخل اللبن في حلقه ام لا لم يحرم ... وكذا يحرم لبن ميتة ولو معلوبا — [رد المحتار جلد ثاني كتاب النكاح صفحة ١٢٣٦ - ١٢٣٧ - ١٢٣٨ - ١٢٣٩]

Tahtavi, Vol. 2, p. 93; Radd-ul-Muhtâr, Vol. 2, pp. 436, 437, 438, 439, 443.

ARTICLE 376.

(مادة ٣٧٦) — ويثبت التحريم في المدة ... ويثبت به ... امومية المرضعة للرضيع و ... ابوة زوج موضوعة اذا كان لبنها منه له — [رد المحتار جلد ثاني كتاب النكاح صفحة ١٢٣٧ - ١٢٣٨ - ١٢٣٩]

و الوطىء بشبهة كالعالم — [رد المحتار جلد ثاني كتاب النكاح صفحة ١٢٤٦]

ولا حل بين رضيعي امرأة لكونهما اخوين — (ان كان اللبن الذي شرباه لرجل واحد وام واحدة ... او لام ان لم يكن لرجل واحد وقد يكونان لاب — طحطاوي جلد ثاني كتاب النكاح صفحة ٩٦)

وان اختلف الزمن ... ولا حل بين الرضيعة وولد مرضعتها — اى من النسب اما الذي من الرضاع فانه ... كذاك — [رد المحتار جلد ثاني كتاب النكاح صفحة ١٢٤٢]

اذا كان لرجل امرأتان و ولدتا منه فارضعت كلواحدة صغيرا فان الصغيرين اخوان لاب حتى ... لا يعزل النكاح بينهما — [رد المحتار جلد ثاني كتاب النكاح صفحة ١٢٤٢]

رجل وطىء امرأة بنكاح فامد ثم تزوج صبية فارضعتها ام الموطوءة بانت الصبية — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ٥٠]

Radd-ul-Muhtâr, Vol. 2, pp. 437, 438, 439, 442, 446; Tahtavi, Vol. 2, p. 96; Fatawa-i-Alamgiri, Vol. 2, p. 50.

ARTICLE 377.

(مادة ٣٧٧) — اصله يحرم من الرضاع ما يحرم من النسب ... والمصاهرة ... حتى لا يجوز له ان يتزوج بامه ... ولا بنت امرأته ... من الرضاع ... واخته الشقيقة اولاد اولام *

وزوجة الابن والاب من الرضاع الا ام اخيه واخته ... واخت ابنه وبنته وجدة ابنه وبنته و ام عمه وعمته و ام خاله وخالته و ... عمه ولده ... و بنت عمه ابنه ... و بنت عمه بنته ... و بنت اخت ابنه ... و بنت اخت بنته ... و ام ولد ابنه ... و ام ولد بنته ... وتعل اخت اخيه رضاعا *

يعمل لها ابو اخيها و اخو ابنها و جد ابنها و ابو عمها و ابو خالها و خال ولدها و ابن خالة ولدها و ابن اخت ولدها — [ردالمحتار جلد ثاني كتاب النكاح صفحه ٤٣٩ - ٤٤٠ - ٤٤١ - ٤٤٢]

Radd-ul-Muhtâr, Vol. 2, pp. 439, 440, 441, 442.

ARTICLE 378.

(مادة ٣٧٨) — و لو ارضعت الكبيرة ... ضرثها الصغيرة ... في مدة الرضاع ... حرمتا ابدأ ان دخل بالام ... والا جاز تزوج الصغيرة ثانيا ... ولبنها حينئذ من غيره ... ولا مهر للكبيرة ان لم توطأ ... وللصغيرة نصفه ... ورجع الزوج به على الكبيرة ... ان تعمدت الفساد بان تكون عاقلة طائفة مستيقظة عالمة بالنكاح و بافساد الارضاع و لم تقصد دفع جوع او هلاك والا لا — [ردالمحتار جلد ثاني كتاب النكاح صفحه ٤٤٤ - ٤٤٥]

Radd-ul-Muhtâr, Vol. 2, pp. 444, 445.

ARTICLE 379.

(مادة ٣٧٩) — و ان ثبت عليه فرق بينهما و الرضاع حجة ... وهي شهادة عدلين او عدل وعدلتين لكن لا تقع الفرقة الا بتفريق القاضي ... ولا مهر ان لم يدخل ... ولو دخل ... لها اخذ الاقل من مهر المثل والمسمى لا النفقة والسكنى — [ردالمحتار جلد ثاني كتاب النكاح صفحه ٤٤٧ - ٤٤٨]

Radd-ul-Muhtâr, Vol. 2, pp. 447, 448.

SECTION III.

الفصل الثالث في الحضافة

ARTICLE 380.

(مادة ٣٨٠) — تربية الولد تثبت للام النسبية ... في حال قيام النكاح او بعد الفرقة — و الام احق بالولد — [ردالمحتار جلد ثاني كتاب الطلاق صفحه ٦٨٧]

Radd-ul-Muhtâr, Vol. 2, p. 687.

ARTICLE 381.

(مادة ٣٨١) — والعاضنة الزميمة ولو مجوسية كمسلمة ما لم يعقل ديناً ... او الى ان يخاف ان يألف الكفر فيذرع منها و ان لم يعقل ديناً — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٦٩٣]

Radd-ul-Muhtâr, Vol. 2, p. 693.

ARTICLE 382.

(مادة ٣٨٢) — يشترط في العاضنة ان تكون حرة بالغة عاقلة امينة ... لا يضيع الولد عندها باشغالها منه بالخروج من منزلها كل وقت ... قادرة ... على الحفظ ... ولم تكن مرتدة ... بلا فرق في ذلك ... وان تغلو من زوج اجنبي ... ولم تمسكه في بيت المبعض للولد — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٦٨٧ - ٦٩٦]

Radd-ul-Muhtâr, Vol. 2, pp. 687, 696.

ARTICLE 383.

(مادة ٣٨٣) — والعاضنة يسقط حقها بنكاح غير محرمه اى الصغير ... سواء كان دخل بها او لا ... فاذا تزوجته سقط حقها ... تنتقل العاضنة لمن يلي الام في الاستحقاق اذا كان مستحق للعضانة اقرب منه فلولم يكن غيره وكان الولد ذكراً يبقى عند امه ... وتعود العضانة بالفرقة البائنة لزوال المانع — [ردالمحتار جلد ثاني كتاب النكاح صفحہ ٦٩٣ - ٦٩٤]

Radd-ul-Muhtâr, Vol. 2, pp. 693, 694.

ARTICLE 384.

(مادة ٣٨٤) — حق ... العضانة ... من قبل امها ... اعتباراً لقرب القرابة و تقديم المدلى بالام على المدلى بالاب عند اتعاد مرتبتهما قرناً — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٦٩٢]

بعد الام بان ماتت ... او تزوجت باجنبي ... اولم تكن اهلاً للعضانة ام الام وان علت ثم ام الاب وان علت ... عند عدم اهلية القربى ثم ... اخت الصغير ... والاخت لام تلى الأخت الشقيقة ثم لام ... ثم الاخت لاب ثم بنت الاخت لابوين ثم لام ... ثم خالات الصغير كذلك اى لابوين ثم لام ثم لاب ثم بنت الاخت لاب ثم بنات الاخ ثم العمات كذلك اى تقدم العمه لاب و ام ثم لام ثم لاب ثم خالة الام كذلك ثم خالة الاب كذلك ثم عمات الامهات و الآباء بهذا الترتيب — [ردالمحتار جلد ثاني كتاب النكاح صفحہ ٦٩٢]

Radd-ul-Muhtâr, Vol. 2, p. 692.

ARTICLE 385.

(مادة ٣٨٥) — ان لم يكن للصغير احد من معارضة النساء ... او كان الا انه ساقط العضاة ثم العصباء بترتيب الارث فيقدم الاب ثم الجد ثم الاخ الشقيق ثم الاب ثم بنو الاخ ثم بنو الاخ ثم العم شقيق الاب ثم لاب — فان تساوا فاصلحهم ثم اورعهم ثم اكبرهم اشترط ... في العصباء انعاد الدين حتى لو كان للصبي اليهودي اخوان احدهما مسلم يدفع لليهودي ... لا للمسلم — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٦٩٢ - ٦٩٣]

Radd-ul-Muhtâr, Vol. 2, pp. 692, 693.

ARTICLE 386.

(مادة ٣٨٦) — العصباء المستحق ان لو لم يستحق ... و ... لا العصباء الفاسق ... ومعتوه وابن عم لمشتهاءة وهو غير مأمون ... لا تسلم اليهم هذا يفيد ان الذكر يدفع الى ابن العم ولا تدفع اليه الانثى ... ثم اذا لم يكن عصباء فذو الارحام ... فتدفع لـ اخ لام ينبغي ان يذكر اولا الجد لام ... انه اولى من الاخ لام والخال ثم لابنه ثم للعم لام ثم للخال لابوين ثم لاب ثم لام ... وابن العم له حق في الغلام دون الجارية لعدم المعروية ... وان لم يكن للجارية غير ابن العم فلاختيار للقاضي ان راع اسلمح ضمها اليه والا توضع على يد امينة و ... ثقة — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٩٣]

Radd-ul-Muhtâr, Vol. 2, p. 693.

ARTICLE 387.

(مادة ٣٨٧) — ولا تجبر من لها العضاة عليها ... اذا امتنعت ... الا اذا تعينت لها بان لم يأخذ ثدى غيرها ... وان لا يكون للصغير ذورحم محرم فحينئذ تجبر ... ولو وجد غيرها ... وامتنع من القبول ... تجبر الام على العضاة اذا لم يكن لها زوج — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٨٩ - ٦٩٠]

Radd-ul-Muhtâr, Vol. 2, pp. 689, 690.

ARTICLE 388.

(مادة ٣٨٨) — اجرة العضاة ... وهي غير اجرة ارضاعه ونفقته ... مؤنة العضاة في مال المحضون لولاه والا ... يجب على الاب ... اجرة الرضاع و اجرة العضاة ونفقة الولد جميعا — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٦٩١]

Radd-ul-Muhtâr, Vol. 2, p. 691.

ARTICLE 389.

(مادة ٣٨٩) — اذا كانت العضاة إما ... كانت منكوحة او معتدة لبيده لم تستحق اجرة ... على العضاة ... فلو كانت غيرها فالظاهر استحقاتها اجرة العضاة ... مع

العبر ... لو كانت في نكاح او عدة رجل غير الاب ... اذا كان النكاح معزما للصغير ... وعن هذا كان الوجه عدم الفرق بين معدة الرجعي والبائن — سئل ابو حفص عن لها امسك الولد وليس لها مسكن مع الولد فقال على الاب سكنها جميعا ... وكذا ان احتاج الصغير الى خادم يلزم الاب به ... لو غنياً فلو كانت غيرها فالظاهر استحقاقها اجرة العضاة بالاولى — [رد المختار جلد ثاني كتاب الطلاق صفحہ ۶۹۰ - ۶۹۱]

Radd-ul-Muhtâr, Vol. 2, pp. 690, 691.

ARTICLE 390.

(ماده ۳۹۰) — او ايت ان تريد مجانا والعمال ان الاب معسر ... ولم يوجد احد متبرعا ... وجبت نفقة الولد على ... امه فالام ترجع على الاب اذا ايسر — فان وجد (متبرع بالعضاة) ... وان كان الاب موسرا ولا مال للصغير فالام مقدمة وان طلبت الاجرة — فان كان الاب معسرا والصغير له مال او لا يقال للام اما ان تمسكه مجانا او تدفعه للعمة ... المتبرعة ... (صريح في انه ينزع من الام ولا تمنع عن رويتها له وتعهدها اياه) وان كان الاب موسرا والصغير له مال فذلك ... ان كان اجنيا يدفع للاهل للعضاة باجرة المثل ولو من مال الصغير — [رد المختار جلد ثاني كتاب الطلاق صفحہ ۶۸۸ - ۶۹۲]

Radd-ul-Muhtâr, Vol. 2, pp. 688, 692.

ARTICLE 391.

(ماده ۳۹۱) — والعاضة ... احق ... بالغلام حتى يستغني عن النساء وقد يسبح و ... بالصغيرة ... قدر يتسع - ويجبر الاب على اخذ الولد بعد استغنائه عن الام ... و اذا انتهت العضاة ولم يوجد له عصة ولا وصي ... يترك عند العاضة الا ان يرى القاضي غيرها اولى له — [رد المختار جلد ثاني كتاب الطلاق صفحہ ۶۹۱ - ۶۹۵] و اذا استغنى الغلام وبلغت الجارية بالعصبة اولى يقدم الاقرب فالاقرب ولا حق لابن العم في حضاة الجارية — [رد المختار جلد ثاني كتاب الطلاق صفحہ ۶۹۴ - ۶۹۵]

Radd-ul-Muhtâr, Vol. 2, pp. 694, 695.

ARTICLE 392.

(ماده ۳۹۲) — يمنع الاب من اخراجه من بلد امه بلا رضاها ما بقيت حضانتها فلو اخذ المطلق ولده منها لتزوجها جاز له ان يسافر به ... اذا لم يكن له من ينتقل الحق اليه بعدها الى ان يعود حق امه — [رد المختار جلد ثاني كتاب الطلاق صفحہ ۶۹۷ - ۶۹۸]

Radd-ul-Muhtâr, Vol. 2, pp. 697, 698.

ARTICLE 393.

(ماده ۳۹۳) — ليس للمطلقة ... الخروج بالولد من بلدة الى اخرى ... قبل

انقضاء العدة مطلقا *

ليس للمطلقة بائنا بعد عدتها الخروج بالولد من بلدة الى أخرى بينهما تفاوت ... ومن قرية الى مصر بينهما تفاوت ومن قرية ... الى قرية ... الا اذا كان ما انتقلت اليه وطنها وقد نكحها ثمه وفي انتقالها من مصر الى القرية لا تمكن من ذلك ولو كانت القرية قريبة ... الا اذا كان ... وطنها وقد ... عقد عليها في وطنها — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۶۹۶ - ۶۹۷]

Radd-ul-Muhtār, Vol. 2, p. 697.

ARTICLE 394.

(ماده ۳۹۴) — هذا الحكم في الام ... اما في غيرها ... فلا تقدر على نقله ... الا باذن الاب — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۶۹۷]

Radd-ul-Muhtār, Vol. 2, p. 697.

SECTION IV.

الفصل الرابع في النفقة الواجبة للابناء على الآباء

ARTICLE 395.

(ماده ۳۹۵) — تجب النفقة بانواعها (من الطعام والكسوة والسكنى على الحر لطفله ... الفقير الحر ... يعم الاثنى ... الى ان يحتلم ... يبلغ حد الكسب ... لو كان ذكرا ... وينفق عليه من كسبه ... فمجرد الانوثة عجز الا اذا كان لها زوج فنفقتهما عليه — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۲۷ - ۷۲۸ - ۷۲۹]
— البحر الرائق جلد رابع صفحہ ۲۱۸] — و نفقة الإناث واجبة مطلقا على الآباء مالم يتزوجن — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۱۷۸] —
ويجبر الكافر على نفقة ولده المسلم — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۱۷۸]

Bahrr-ul-Rayek, Vol. 4, p. 218; Fatawa-i-Alamgiri, Vol. 2, p. 178; Radd-ul-Muhtār, Vol. 2, pp. 727, 728, 729.

ARTICLE 396.

(ماده ۳۹۶) — تجب لولده الكبير العاجز عن الكسب ... و ... من به مرض مزمن ... يمنعه عن الكسب ... و ... اذا كان من ابناء الكرام ولا يستأجره الناس فهو عاجز ... كائى اى ولو لم يمكن بها زمانه تمنعها عن الكسب فمجرد الانوثة عجز الا اذا كان لها زوج — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۲۹]

Radd-ul-Muhtār, Vol. 2, p. 729.

ARTICLE 397.

(مادة ٣٩٧) — لا يشارك ... الأب ... احد في ... نفقة طفله ما لم يكن معسرا...
 زمنا ... فيلحق بالميت فتجب على غيره بلا رجوع عليه — [ردالمحتار جلد ثاني
 كتاب الطلاق صفحة ٧٣٠]

Radd-ul-Muhtâr, Vol. 2, p. 730.

ARTICLE 398.

(مادة ٣٩٨) — نفقة الصغار والإناث المعسرات على الأب لا يشاركه في ذلك احد
 ولا تسقط بفقرة ... فالأب يكتسب او يتكفف وينفق عليهم ... وان امتنع عن الكسب
 (مع قدرته) حبس — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢٨ - ٧٣٠]
 فان لم يف كسبه بعاجتهم او لم يكتسب بعدم تيسر الكسب انفق عليهم القريب ...
 ورجع على الأب اذا ايسر — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢٨]

Radd-ul-Muhtâr, Vol. 2, pp. 728, 730.

ARTICLE 399.

(مادة ٣٩٩) — أب معسروام موسرة تؤمر الام بالانفاق ... وهي اولى من الجد
 الموسر ... فالام اولى بالتعمل من سائر الاقارب ... فلو كانا فقيرين والجد ... او الغال
 او العم موسر يجبر على نفقة الصغير ... ويكون دينا ولو لم تيسر انفق عليهم القريب
 ورجع على الأب اذا ايسر ... لو كان معسرا وامر القاضي غيره بالانفاق يوجع سواء كان ...
 المنفق أمّا او جدا او غيرهما في ثبوت الرجوع على الأب — ما لم يكن الأب زمناً —
 [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٢٨ - ٧٢٩ - ٧٣٠]

Radd-ul-Muhtâr, Vol. 2, pp. 728, 729, 730.

ARTICLE 400.

(مادة ٤٠٠) — فان كان معهم أب فالنفقة عليه ... والا فاما ان يكون بعضهم
 وارثا وبعضهم غير وارث ... فان تساوا في القرب ... ترجح الوارث ... ففي جد لام وجد
 لأب تجب على الجد لأب ... وبعضهم غير وارث ... يعتبر الأقرب جزئية ... له ام وجد
 لام فعلى الام — لو كان كل الاصول وارثين فكلارث ففي ام وجد لأب تجب عليهما
 اثلاثا — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٣٧]

Radd-ul-Muhtâr, Vol. 2, p. 737.

ARTICLE 401.

(مادة ٤٠١) — الاصول مع العواشي فان كان احد الصنفين غير وارث اعتبر
 الاصول وحدهم ترجيحا للجزئية ... فيقدم الاصل سواء كان هو الوارث او كان الوارث

الصنف الآخر: لو له جد لاب و اخ شقيق فعلى الجدة ... و ... لو له جد لام وعم فعلى الجدة ... و ان كان كل من الصنفين اعني الاصول والعواشي وارنا اعتبر الارث ففي ام و اخ عصبي او ابن اخ كذلك او عم كذلك على الام الثلث وعلى العصبث الثلثان — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۳۷]

Radd-ul-Muhtâr, Vol. 2, p. 737.

ARTICLE 402.

(ماده ۴۰۲) — اذا كان الرجل غائبا و ... المال حاضر عند هؤلاء وكان النسب معروفا او علم القاضي بذلك امرهم بالنفقة منه ... و كذلك ان كان ماله وديعة عند انسان و هو مقر بها امرهم القاضي بالانفاق منها وكذلك اذا كان له دين على انسان و هو مقر به و ان كان صاحب اليد او المديون مذكور ... هذا اذا كان المال من جنس النفقة ... فاما اذا لم يكن من جنس حقهم ... اجمعوا على ان حال حضرة من يجب عليه النفقة ليس لاحد ممن يستحق النفقة بيع العروض و العقار — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۱۷۸ - ۱۷۹]

و يأمر (الام على نفقة الولد) بالانفاق و الاستدانة — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۳۱]

و اذا كان للغائب عند ... الولد ... مال هو من جنس حقوقهم فانفقوا على انفسهم جاز بقدر ما يحتاج اليه من النفقة على قدر سعة اموالهم و ضيقها — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۳۱ — فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۱۷۸]

Fatawa-i-Alamgiri, Vol. 2, pp. 178, 179; Radd-ul-Muhtâr, Vol. 2, p. 731.

ARTICLE 403.

(ماده ۴۰۳) — لا تجب على الاب ... نفقة (زوجة الابن) ... ان كان صغيرا لا مال له ... الا اذا كان ضمنها ... ثم يرجع على الابن اذا ايسر — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۶۹۹]

Radd-ul-Muhtâr, Vol. 2, p. 699.

ARTICLE 404.

(ماده ۴۰۴) — فان بلغه ... (ابى حد الكسب) ... كان للاب ان يوجزه او يدفعه في حرفة ليكتسب و ينفق عليه من كسبه لو كان ذكرا — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ۷۲۸]

و ما فضل من نفقتهم يحفظ ذلك عليهم الى وقت بلوغهم — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۷۲۸]

ولو قدر على اكتساب ما لا يكفيه فعلى إبيه تكميل الكفاية إلا إذا كان لا يكفيها فتجب على الأب كفايتها ... لو استغنت الأنثى بنحو خياطة وغزل يجب أن تكون نفقتها في كسبها ... إلا إذا كان لا يكفيها ... فتجب على الأب كفايتها بدفع القدر المعجوز عنه ... — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٢٨ - ٧٢٩]

Radd-ul-Muhtâr, Vol. 2, pp. 728, 729; Fatawa-i-Alamgiri, Vol. 2, p. 178.

ARTICLE 405.

(مادة ٤٠٥) — ولو خاصته الأم ... أن لا ينفق أو أنه يقتصر ... في نفقتها— فرضها القاضي و امرؤ بدفعها للأم ما لم تثبت خيانتها فيدفع لها صباها ومساء ... ولا يدفع إليها جملة و إن شاء امرؤها لينفق عليهم — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٢٩ - ٧٢٨]

فإن لم تكن الأم ثقة يدفع إلى غيرها لينفق على الولد — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٧]

Radd-ul-Muhtâr, Vol. 2, pp. 728, 729; Fatawa-i-Alamgiri, Vol. 2, p. 177.

ARTICLE 406.

(مادة ٤٠٦) و إن صالحت المرأة زوجها عن نفقة الأولاد ... صح ... فبعد ذلك ... إن كان ما وقع الصلح عليه أكثر من نفقتهم ... بأن كانت الزيادة زيادة تدخل تحت تقدير المقيدين في مقدار كفايتهم فإنها تكون عفوا وإن كانت الزيادة بحيث لا تدخل تحت تقدير المقيدين فإنها تطرح عنه و إن كان المصالح عليه أقل من نفقتهم بأن كان لا يكفيهم يبلغ إلى مقدار كفايتهم — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٨]

Fatawa-i-Alamgiri, Vol. 2, p. 178.

ARTICLE 407.

(مادة ٤٠٧) — لو قضي القاضي ... بنفقة ... الصغير ومضى مدة ... شهر فأكثر ... فلا تسقط نفقته المقضى بها بضي المدة كالزوجة بخلاف سائر الأقارب و ... إن فرض القاضي النفقة على الأب فغاب الأب وتركهم بلا نفقة فاستدانت بامر القاضي وانفقت عليهم ترجع عليه بذلك فإن لم تستدن بعد الفرض ... و ... لم ترجع حتى مات لم تأخذها من تركته — [رد المحتار جلد ثاني كتاب الطلاق صفحة ٧٢٣ - ٧٢٤]

و إن كان القاضي بعد ما فرض نفقة الأولاد امرها بالاستدانة فاستدانت حتى يثبت لها حق الرجوع على الأب فمات الأب قبل أن يؤدي لها هذه النفقة هل لها أن تأخذ من ماله إن ترك ما لا ذوق في الأصل إن لها ذلك وهو الصحيح و أما إذا لم يامرها بالاستدانة

فاستدانت ثم مات الزوج قبل ان يؤدي اليها ذلك ليس لها ان تأخذ من ماله ان ترك
مالاً بالانفاق — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۱۷۷]

Radd-ul-Muhtâr, Vol. 2, pp. 743, 745; Fatawa-i-Alamgiri, Vol. 2, p. 177.

CHAPTER III.

الباب الثالث في النفقة الواجبة للابوين على الابناء

ARTICLE 408.

(مادة ۴۰۸) — يجبر الولد الموسر على نفقة الابوين المعسرین مسلمين كانا
او زميين قدرا على الكسب او لم يقدر — [فتاوى عالمگیری جلد ثاني كتاب الطلاق
صفحہ ۱۷۹]

و اجداده وجداته ... الفقراء — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۷۳۶]
ولا يشارك الولد الموسر احد في نفقة ابويه المعسرین — [فتاوى عالمگیری جلد
ثاني كتاب الطلاق صفحہ ۱۷۹]

Fatawa-i-Alamgiri, Vol. 2, p. 179; Radd-ul-Muhtâr, Vol. 2, p. 736.

ARTICLE 409.

(مادة ۴۰۹) — ان يكون بالآب علة لا يقدر على خدمة نفسه و يحتاج الى خادم
يقوم بشانه و يخدمه فح يجبر الابن على نفقة خادم الآب منكـوحة كانت او امة —
[فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۱۷۹]

و ان كان للآب زوجتان او اكثر لم يلزم الابن الا نفقة واحدة و يدفعها الى الآب —
[فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۱۷۹]

Fatawa-i-Alamgiri, Vol. 2, p. 179.

ARTICLE 410.

(مادة ۴۱۰) — الام المتزوجة فان نفقتها على الزوج ... و ... ان الزوج لو كان
معسراً فان الابن يؤمر بان يقرضها ثم يرجع عليه اذا ايسر لان زوج المعسر كالاميت —
[رد المحتار جلد ثاني كتاب الطلاق صفحہ ۷۳۵]

Radd-ul-Muhtâr, Vol. 2, p. 735.

ARTICLE 411.

(مادة ۴۱۱) — لا يجب على الابن الفقير نفقة والده الفقير حكماً الا ان كان والده
زماً لا يقدر على العمل و لابن عيال فعليه ان يضمه الى عياله و ينفق على الكل ...

ولا يجبر على ان يعطيه شيئاً لعدة ... و الام بمنزلة الاب الزمن ... وان الكسوف يدخل ابويه في نفقته — [رد المختار جلد ثاني كتاب الطلاق صفحة ٧٣٥]

Radd-ul-Muhtâr, Vol. 2, p. 735.

ARTICLE 412.

(مادة ٤١٢) — وتفرض ... على الغائب ... نفقة ... ابويه ... الفقيرين ... في مال له من جنس حقهم ... عند او على من يقر به عند الامانة و على للدين — [رد المختار جلد ثاني كتاب الطلاق صفحة ٧٢٢]

ضمن قضاء ... مودع الابن كمدبونه لو اتفق الوديعة على ابويه ... بغير امر مالك او قاض ... لا رجوع ... للمودع على الاب بما انفقه عليه اذا ضمنه الغائب ... فاذا انفق على ابى الغائب ... بلا امر ثم مات الغائب ولا وارث له غير الاب فلا رجوع للاب على المودع — [رد المختار جلد ثاني كتاب الطلاق صفحة ٧٢٢ - ٧٢٣]

Radd-ul-Muhtâr, Vol. 2, pp. 722, 742, 743.

ARTICLE 413.

(مادة ٤١٣) — ومصرها ... فقير ... ليس له من ثجب نفقته عليه — [رد المختار جلد ثالث فصل فى الجزية صفحة ٣٠٩]

Radd-ul-Muhtâr, Vol. 3, p. 306.

ARTICLE 414.

(مادة ٤١٤) — الاصل فى نفقة الوالدين ... القرب بعد الجزية دون الميراث ... تعتبر اولاً الجزية ... اصولاً او فروعاً ... ثم يقدم فيها الاقرب فالاقرب ولا ينظر الى الارث النفقة لاصوله ... بالسوية بين الابن والبنت — [رد المختار جلد ثاني كتاب الطلاق صفحة ٧٣٥ - ٧٣٦]

وان كان للفقير ابنان احدهما فائق فى الغنى والآخر يملك نصاباً كانت النفقة عليهما على السواء ولو كان احدهما مسلماً والآخر ذمياً — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحة ١٧٩]

وفي ابن وابن ابن على الابن و ... لا ترجيح لابن ابن على بنت بنت — [رد المختار جلد ثاني كتاب الطلاق صفحة ٧٣٦]

Radd-ul-Muhtâr, Vol. 2, pp. 735, 736; Fatawa-i-Alamgiri, Vol. 2, p. 179.

CHAPTER IV.

الباب الرابع في نفقة ذوي الارحام

ARTICLE 415.

(مادة ٤١٥) — تجب ... لكل ذي رحم معمر ... فقيرا ... بحيث تحصل له الصدقة ... على من يرثونه اذا مات بقدر ارثهم منه و يجبر عليه ... كل ذي رحم معمر صغير او انثى مطلقا ... سواء ... كان ذكرا ... صغيرا ... او كان الذكر بالغاً لكن عاجزا عن الكسب ... او انثى ... كانت بالغة او صغيرة صبيحة او زمنة ... الصبيحة القادرة على الكسب ... لا ... مكتسبة بالفعل — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٧٣٩ - ٧٤٠]

Radd-ul-Muhtâr, Vol. 2, pp. 739, 740.

ARTICLE 416.

(مادة ٤١٦) — ولا يجب النفقة مع اختلاف الدين الا لزوجة و الابوين و الاجداد و الجدات و الولد و ولد الولد ولا تجب على النصراني نفقة اخيه المسلم و كذلك لا تجب على المسلم نفقة اخيه النصراني ... ولا يجبر المسلم و الذمي على نفقة والديه من اهل العرب و ان كانا مستأمنين في دار الاسلام و كذلك العربي الذي دخل علينا بايمان لا يجبر على نفقة والديه اذا كانا مسلمين او كانا من اهل الذمة — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ١٨١]

Fatawa-i-Alamgiri, Vol. 2, p. 181.

ARTICLE 417.

(مادة ٤١٧) — ولو كان رحما غير معمر ... او معمر غير رحم ... او رحما معمر لا من قرابة ... لا يجب النفقة ولو كان له خال من قبل الاب و الام و ابن عم لاب و ام فالنفقة على الخال و الميراث لابن العم — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ١٨٠]

Fatawa-i-Alamgiri, Vol. 2, p. 180.

ARTICLE 418.

(مادة ٤١٨) — ولو استويا في المعومية ... وفي اهلية الارث ... رجع الوارث ... ووجبت ... على قدر ارثهم ... ما لم يكن معسرا ... و ... في ... الخال و العم اذا اجتمعا ... تجب على العم — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ٧٤١]

لو كان له خال و خالة من قبل الاب و الام فان النفقة عليهما اثلاثا — [فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ١٨٠]

نفقة من ... له اخوات متفرقات بموسرات عليهن اخماسا ... ثلاثة اخماس على الشقيقة وخمس على الاخت لاب وخمس على الاخت لام — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٤٠]

ولو اخوة متفرقين فسدسها على الاخ لام و الباقي على الشقيق — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٤٠]

Radd-ul-Muhtâr, Vol. 2, pp. 740, 741; Fatawa-i-Alamgiri, Vol. 2, p. 180.

ARTICLE 419.

(مادة ١٤١٩) — ولو قضي القاضي ... للوالدين و ذوي الارحام بالنفقة فمضت مدة ... اى شهر فاكثر سقطت ... الا ان يسددين ... بالفعل ... بامر قاضى ... لم تسقط ... فالنفقة دين ثابت ... تؤخذ من تركته ... لو مات — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٤٣ - ٧٤٤ - ٧٤٥]

Radd-ul-Muhtâr, Vol. 2, pp. 743, 744, 745.

CHAPTER V.

الباب الخامس في ولاية الاب

ARTICLE 421.

(مادة ١٤٢١) — و اذا بلغ الابن معتوها او هجنونا تبقي ولاية الاب عليه في ماله و نفسه ... الابن اذا بلغ عاقلا ثم جن ا عته ... يعود الولاية الى الاب — [فتاوى عالمگیری جلد ثاني كتاب النكاح صفحة ١٢]

Fatawa-i-Alamgiri, Vol. 2, p. 12.

ARTICLE 423.

(مادة ١٤٢٣) — و بيع الاب مال صغير ... جائز ... لو الاب عدلا او مستورا — بمثل القيمة و بما يتغابن فيه و هو اليسير و الا لا وهذا ... في المنقول ... و الشراء كالبيع ... و جاز بيع عقار صغير ... لو البائع ابا ... محمودا ... او مستور الحال فليس للصغير نقضه بعد بلوغه — [ردالمحتار جلد خامس كتاب الرضايا صفحة ٤٩٣ - ٤٩٤ - ٤٩٥]

Radd-ul-Muhtâr, Vol. 5, pp. 493, 494, 495.

ARTICLE 424.

(مادة ١٤٢٤) — و ان كان الاب فاسدا لم يجز بيعه العقار فله نقضه بعد بلوغه ... الا اذا باعه بضعف القيمة — [ردالمحتار جلد خامس كتاب الرضايا صفحة ٤٩٤]

Radd-ul-Muhtâr, Vol. 5, p. 495.

ARTICLE 425.

(مادة ٢٥) — الصغير اذا ورث مالا والاب مبذر ... لا تثبت الولاية للاب —
[البحر الرائق جلد ثامن كتاب الوصايا صفحة ٥٢٧]

ولو كان الاب حيا وخيف منه على مال ولده الصغير فان القاضي يخرج المال من يده — [فتاوى قاضي خان جلد رابع كتاب الوصايا صفحة ٢٤٣]

Bahrr-ul-Rayek, Vol. 8, p. 527; Fatawa-i-Kazi Khan, Vol. 4, p. 443.

ARTICLE 426.

(مادة ٢٦) — لو باع ماله من ولده لا يصير قابضا لولده بمجرد البيع حتى لو هلك قبل التمكن من قبضه حقيقة هلك على الوالد ولو لو شرى مال ولده لنفسه لا يبرأ عن الثمن حتى ينصب القاضي وكيله لولده يأخذ الثمن ثم يرده على الاب — [ردالمحتار جلد خامس كتاب الوصايا صفحة ١٤٣ - ١٤٤]

Radd-ul-Muhtâr, Vol. 5, pp. 493, 494.

ARTICLE 427.

(مادة ٢٧) — لو رهن ... الاب مال اليتيم بدين نفسه ... يجوز ... و ... اذا رهن الاب مال ولده الصغير بدين نفسه وقيمة الرهن اكثر من الدين وهلك الرهن عند المرحوم كان على الاب مقدار الدين لا قيمة الرهن — [فتاوى قاضيخان جلد رابع كتاب الوصايا صفحة ١٣٧]

و ... للاب رهن ماله عند ولده الصغير ... وكذا ... رهن متاع طفله من نفسه —
[ردالمحتار جلد خامس كتاب الرهن صفحة ٣٤٨]

Fatawa-i-Kazi Khan, Vol. 4, p. 437; Radd-ul-Muhtâr, Vol. 5, p. 348.

ARTICLE 428.

(مادة ٢٨) — الاب والوصي سواء لا يجوز اقراض كل منهما — [حموى
كتاب الوصايا صفحة ١٤٩ — فتاوى عالمگیری جلد سابع كتاب الوصايا صفحة ١٠٤]

وليس للرعي ان يهب مال اليتيم بعوض او بغير عوض و كذلك الاب — [فتاوى
عالمگیری جلد سابع كتاب الوصايا صفحة ١٠٤]

ليس له وللأب ان يستقروض مال الصغير ... و .. الاب بمنزلة الوصي لا بمنزلة
القاضي — [البحر الرائق جلد ثامن كتاب الوصايا صفحة ٥٢٨]

Hamani, p. 469; Fatawa-i-Alamgiri, Vol. 7, p. 104; Bahrr-ul-Rayek, Vol. 8, p. 528.

ARTICLE 430.

(مادة ٤٣٠) — ولو اشترى لطفله ثوبا او طعاما و اشهد ان يرجع به عليه يرجع لوله مال و الا لا لوجوبهما عليه — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٥٠٥]

Radd-ul-Muhtâr, Vol. 5, p. 505.

ARTICLE 433.

(مادة ٤٣٣) — يبيع الاب .. لا الام ولا بقية اقاربه ولا القاضي ... عوض ابنه الكبير الغائب ... لا عقاره فيبيع عقار صغير ومجنون ... للنفقة له ولزوجته واطفاله ... و... الام ايضا ولا في دين ... للاب على الابن الغائب سوى ... النفقة ... ولا يجوز له بيع زيادة على قدر حاجته فيها — [ردالمحتار جلد ثاني كتاب الطلاق صفحة ٧٤٢]

Radd-ul-Muhtâr, Vol. 2, p. 742.

BOOK V.

الكتاب الخامس في الهبة و الوصايا و الوصي
و العجبر و المفقود

CHAPTER I.

الباب الاول فى الهبة

SECTION I.

الفصل الاول فى اركان الهبة و شرائطها

ARTICLE 435.

(مادة ٢٣٥) — وتصح بايجاب ... و قبول -- [كنز الدقائق كتاب الهبة صفحة ٣٠٢ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٢٨]
ان القبض كالقبول فى البيع — [رد المحتار جلد رابع كتاب الهبة صفحة ٥٥٩ —
فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٠]

Kanz-ud-Dakaiq, p. 302; *Fatawa-i-Alamgiri*, Vol. 5, pp. 228, 230;
Radd-ul-Muhtâr, Vol. 4, p. 559.

ARTICLE 436.

(مادة ٢٣٦) — و شرائط صحتها فى الواجب العتلى و البلوغ و الملك — [الدرالمختار
جلد ثالث كتاب الهبة صفحة ١٠٢ — فتاوى عالمگیری جلد خامس كتاب الهبة
[٢٢٨ صفحة]

Durrul-Mukhtâr, Vol. 3, p. 102; *Fatawa-i-Alamgiri*, Vol. 5, p. 228.

ARTICLE 437.

(مادة ٢٣٧) — فاناد انه لابد من القبض فيها لثبوت الملك — [البحر الرائق
جلد سابع كتاب الهبة صفحة ٣١١]

و ملك بلا قبض جديد لوفي يد الموهوب له [كنز الدقائق كتاب الهبة صفحة ٣٠٣ —
فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٠]

Bahr-ul-Rayek, Vol. 7, p. 311; Kanz-ud-Dakaiq, p. 303; Fatawa-i-Alamgiri, Vol. 5, p. 230.

ARTICLE 438.

(مادة ٤٣٨) — الهبة ... تملك العين مجاناً — [قرعة عيون الاختيار جلد ثاني
كتاب الهبة صفحة ٣٠٧ - ٣٠٨]

وقال تعالى يهب لمن يشاء إناثاً ويهب لمن يشاء الذكور — [قرعة عيون الاختيار
جلد ثاني كتاب الهبة صفحة ٣٠٨]

Kurat-ul-Ayoon, Vol. 2, pp. 307, 308.

ARTICLE 439.

(مادة ٤٣٩) — [والعمرى جائزة للمعمر له في حال حياته ولو ورثته من بعد
موته — ومعناه ان يجعل دارة له عمره و اذا مات يرد بها عليه فيصح التملك ويبطل
الشرط و الهبة لا تبطل بالشرط الفاسدة — [جوهره نيرة جلد ثاني كتاب الهبة صفحة
١٢ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٢٨]

و الرقبى باطلة و هي ان يقول دارى لك رقبى ومعناه ان مت فهي لي و ان مت
فهي لك — [فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٢٨ — فتاوى قاضىخان
جلد رابع كتاب الهبة صفحة ٢٧٩]

*Jawahir-i-Nayara, Vol. 2, p. 14; Fatawa-Alamgiri, Vol. 5, p. 228;
Fatawa-i-Kazi-Khan, Vol. 4, p. 279.*

SECTION II.

الفصل الثاني فيما تجوز هبته وما لا تجوز

ARTICLE 440.

(مادة ٤٤٠) — و هبة المشاع فيما لا يقسم جائزة — [قدورى كتاب الهبة صفحة
١٣٩ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٢٩]

اى ليس من شأنه ان يقسم بمعنى انه لا يبقى منتقما به بعد القسمة اصلاً ... اولا
فبقى منتقما به بعد القسمة من جنس الانتفاع الذي كان قبل القسمة — [قرعة عيون
لاختيار جلد ثاني كتاب الهبة صفحة ٣٢٣ — فتاوى عالمگیری جلد خامس كتاب الهبة
صفحة ٢٢٩]

Koodoori, p. 136; Fatawa-i-Alamgiri, Vol. 5, p. 229; Kurat-ul-Ayoon, Vol. 2, p. 323.

ARTICLE 441.

(مادة ١٤١) — ولا يجوز الهبة فيما يقسم إلا محصورة مقسومة — [جوهرة نيرة جلد ثاني كتاب الهبة صفحة ٨]
 و... في مشاع يقسم ويبقى منتفعا به قبل القسمة وبعدها — [فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٢٩]
 ونعني بالمقسوم ان يبقى منتفعا قبل القسمة وبعدها — [حاشية هدايه جلد ثالث كتاب الهبة صفحة ٢٩٩]
 رجل وهب نصيبه مما يقسم ... ان وهب من شريكه لا يجوز — [فتاوى قاضيخان جلد رابع كتاب الهبة صفحة ٢٨٢ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٠ - ٢٣٢]

Jawahir-i-Nayera, Vol. 2, p. 8; *Fatawa-i-Alamgiri*, Vol. 5, pp. 229, 230, 232; *Hidaya*, Vol. 3, p. 269; *Fatawa-i-Kazi Khan*, Vol. 4, p. 282.

ARTICLE 442.

(مادة ١٤٢) — واعلم ان الضابطة في هذا المقام ان الموهوب اذا اتصل بملك الواهب اتصال خلقه وامكن فصله لا تجوز هبته مالم يوجد الانفصال والتسليم كما اذا وهب الزرع او الثمر بدون الارض والشجر او بالعكس وان اتصل اتصال مجاورة فان كان الموهوب مشغولا بعق الواهب لم يجوز كما اذا وهب السرج على الدابة ... وان لم يكن مشغولا جاز كما اذا وهب دابة مسرجة دون سرجها — [قرة عيون الاخبار جلد ثاني كتاب الهبة صفحة ٣٢٠ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣١ - ٢٣٢]
 ولو سلمه شاعرا لا يملكه حتى لا ينفذ تصرفه فيه فيكون مضمونا عليه وينفذ فيه تصرف الواهب ... و... واجمع الكل على ان الواهب استردادها من الموهوب له ولو كان ذا رحم محرم من الواهب ... وكما يكون للواهب الرجوع فيها يكون لوارثه بعد موته — [قرة عيون الاخبار جلد ثاني كتاب الهبة صفحة ٣٢٥ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣١]

Kurat-ul-Ayoon, Vol. 2, pp. 320, 325; *Fatawa-i-Alamgiri*, Vol. 5, pp. 231, 232.

ARTICLE 443.

(مادة ١٤٣) — وان وهب دقية في ابر لا ... اى لا تصح الهبة او اشار بها الى ان هبة المعدوم تقع باطله ... فدخل فيه ما لو وهب دهنًا في سمس أو سمنًا في لبن — [البحر الرائق جلد سابع كتاب الهبة صفحة ٣١٢ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٢٨]

Bahrr-ul-Rayek, Vol. 7, p. 312; *Fatawa-i-Alamgiri*, Vol. 5, p. 228.

ARTICLE 444.

(مادة ٤٤٤) — وبإثبات دارا - المراد بها ما يقسم - لواحد ص ... وبقائه — وهو هبة واحد من اثنين — غير فقيرين ... لا — هذا إذا لم يبين نصيب كل واحد منهما إما إذا بين ... يجوز أن قبضه ... و ... الملق الاثنان فافاد انه لا فرق بين أن يكونا كبيرين أو صغيرين أو أحدهما كبيرا والآخر صغيرا — [قرعة عيون الاختيار جلد ثاني كتاب الهبة صفحة ٣٣٥ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٠ - ٢٣١]

ولو قال وبعت منكما هذه الدار والمبهور لهما فقيران صحت الهبة بالإجماع — [رد المحتار جلد رابع كتاب الهبة صفحة ٥٦٥ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٠]

Kurrat-ul-Ayoon, Vol. 2, p. 335; Fatawa-i-Alamgiri, Vol. 5, pp. 230, 231; Radd-ul-Muhtâr, Vol. 4, p. 565.

ARTICLE 445.

(مادة ٤٤٥) — هبة الدين ممن عليه الدين وإبراء ولا يتم من غير قبول من المديون ويرتد بده ... وهذا إذا لم يكن الدين بدل الصرف فاما إذا كان بدل الصرف فأبراء رب الدين منه أو هبة منه فإنه يتوقف على قبوله — [فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٤]

هبة الدين ممن عليه الدين وإبراء عنه يتم من غير قبول إذا لم يجب انفساخ عقد سلم أو صرف — [الدر المختار جلد ثالث كتاب الهبة صفحة ١٠٧]

Fatawa-i-Alamgiri, Vol. 5, p. 234; Durrul-Mukhtâr, Vol. 3, p. 107.

ARTICLE 446.

(مادة ٤٤٦) — تملك الدين ممن ليس عليه الدين باطل إلا في ثلث حالات وصية وإذا ... سلب المملك غير المديون على قبضه — أي الدين فيصمح حينئذ — [الدر المختار جلد ثالث كتاب الهبة صفحة ١٠٧ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٤]

Durrul-Mukhtâr, Vol. 3, p. 107; Fatawa-i-Alamgiri, Vol. 5, p. 234.

SECTION III.

الفصل الثالث فيمن يجوز له قبض الهبة

ARTICLE 447.

(مادة ٤٤٧) — وهبة من له ولاية على الطفل ... للطفل ... في الجملة وهو كل من يعول فدخل الأخ والعمة عدد عدم الأب لو في عيالهم تدم بالعقد — أي بالإيجاب

فقط ... ولا يفتقر إلى القبض لأنه هو الذي يقبض له فكان قبضه كقبضه ... لو الموهوب معلوماً وكان في يده أو يد مودعه - وكذا في يد مستعيره لا ... غاصبه أو مرتهنه ... وهل يشترط فيه أن يكون محوزاً مقسوماً ... الظاهر نعم ... وقوله على الطفل أخرج به الولد الكبير فإن الهبة لا تتم إلا بقبضه ولو كان في عياله — [قرة عيون الاختيار جلد ثاني كتاب الهبة صفحة ٣٢٩ - ٣٣٠ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٨ - ٢٣٩]

Kurat-ul-Ayoon, Vol. 2, pp. 329, 330; *Fatawa-i-Alamgiri*, Vol. 5, pp. 238, 239.

ARTICLE 448.

(مادة ١٤٨) — وإن وهب له اجنبيّ تتم بقبض وليه - وهو أحد أربعة الأب ثم وصيه ثم الجد ثم وصيه وإن لم يكن في حجرهم وعند عدمهم تتم بقبض من يعوله ... وبقبضه لو صمياً ... ولو مع وجود ابنة — [الدر المختار جلد ثالث كتاب الهبة صفحة ١٠٣ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٩ - ٢٤٠]

Durrul-Mukhtâr, Vol. 3, p. 103; *Fatawa-i-Alamgiri*, Vol. 5, pp. 239, 240.

ARTICLE 449.

(مادة ١٤٩) — ولو قبض زوج الصغيرة - إما البالغة فالقبض لها - بعد الزفاف ما وهب لها صمً قبضه ولو بعصفرة الأب ... وقبله — أي الزفاف — لا — يصح — [الدر المختار جلد ثالث كتاب الهبة صفحة ١٠٤ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٩ - ٢٤٠]

Durrul-Mukhtâr, Vol. 3, p. 104; *Fatawa-i-Alamgiri*, Vol. 5, pp. 239, 240.

SECTION IV.

الفصل الرابع في الرجوع في الهبة

ARTICLE 450.

(مادة ١٥٠) — صح الرجوع فيها ... مع انتفاء مانعه ... ولو مع إسقاط حقه من الرجوع — [الدر المختار جلد ثالث كتاب الهبة صفحة ١٠٤ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٥ - ٢٣٨]

و يصح الرجوع فيها — كلما از بعضاً — [قرة عيون الاختيار جلد ثاني كتاب الهبة صفحة ٢٣٨ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٥]

Durrul-Mukhtâr, Vol. 3, p. 104; *Fatawa-i-Alamgiri*, Vol. 5, pp. 235, 238; *Kurat-ul-Ayoon*, Vol. 2, p. 338.

ARTICLES 451, 452, 453, 454, 455, 456.

(مادة ٤٥١ - ٤٥٢ - ٤٥٣ - ٤٥٤ - ٤٥٥ - ٤٥٦) — و يمنع الرجوع فيها ... الزيادة في نفس العين (خرج الزيادة من حيث السعر فله الرجوع — رد المختار جلد رابع كتاب الهبة صفحہ ١٥٦) — الموجبة لزيادة القيمة — المتصلة ... و ... مانع الزيادة اذا ارتفع ... عاد حق الرجوع ... (و ان كانت الزيادة منفصلة فانها لا تمنع الرجوع سواء كانت متولدة ... او غير متولدة — فتاوى عالمگیری جلد خامس كتاب الهبة صفحہ ٢٣٥)

و ... موت احد العاقدین — بعد التسليم ... و ... العوض ... و ... يشترط فيه شرائط الهبة — قبض و افراز و عدم شيوع ... و يشترط ان لا يكون العوض بعض الموهوب فلو عوضه البعض عن الباقي ... فله الرجوع في الباقي ... و لو عوض النصف رجع بما لم يعوض — ولا يضر الشيوع ... و ... خروج الهبة عن ملك الموهوب له ... بالكلية (و لو اخرج بعضها عن ملكه فله الرجوع فيما بقي — فتاوى عالمگیری جلد خامس كتاب الهبة صفحہ ٢٣٥) و ... الزوجية وقت الهبة (و لهذا لو ابانها بعد الهبة لم يكن له ان يرجع فيها — البعر الرائق جلد سابع كتاب الهبة صفحہ ٣٢٠)

و ... القرابة فلو وهب لذي رحم محرم منه ... خرج من كان ذا رحم وليس بمحرم و من كان محرمًا وليس بذی رحم — و لو ذميا او مستأمنًا لا يرجع ... و لو وهب ... لمحرم بالمصاهرة ... رجع ... و ... هلاك العين الموهوبة ... و لو استهلك البعض له ان يرجع بالباقي ... و الامتهلاك كالهلاك — [فرة عيون الاختيار جلد ثاني كتاب الهبة صفحہ ٣٤٠ - ٣٤١] — [فتاوى عالمگیری جلد خامس كتاب الهبة صفحہ ٢٣٥ - ٢٣٦]

Radd-ul-Muhtâr, Vol. 4, p. 566; Fatawa-i-Alamgiri, Vol. 5, pp. 235, 240; Bahrr-ul-Rayek, Vol. 7, p. 320; Kurat-ul-Ayoon, Vol. 2, pp. 340, 354.

ARTICLE 458.

(مادة ٤٥٨) — و ان استعق نصف الهبة رجع بنصف العوض و عكسه لا ما لم يرد ما بقى ... كما لو استعق كل العوض حيث يرجع في كلها ان كانت قائمة لا ان كانت هالكة — كما لو استعق العوض وقد ازدادت الهبة لم يرجع ... و ان استعق جميع الهبة كان له ان يرجع في جميع العوض ان كان قائما و بمثلها ان كان العوض هالكا و هو مثلي و بقيته ان كان قيميا — [الدرالمختار جلد ثالث كتاب الهبة صفحہ ١٠٥ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحہ ٢٤٠]

Durrul-Mukhtâr, Vol. 3, p. 105; Fatawa-i-Alamgiri, Vol. 5, p. 240.

ARTICLE 459.

(مادة ٤٥٩) — ثلثت العين الموهوبة واستعقها مستعق وضمن المستعق الموهوب له لم يرجع على الواهب بما ضمن — [الدرالمختار جلد ثالث كتاب الهبة صفحہ ١٠٩]

Durrul-Mukhtâr, Vol. 3, p. 106.

ARTICLE 460.

(مادة ١٤٠) — ولا يجوز للاب ان يعرض عما وهب للصغير من ماله —
الدرالمختار جلد ثالث كتاب الهبة صفحة ١٠٥]

Durrul-Mukhtâr, Vol. 3, p. 105.

ARTICLE 461.

(مادة ١٤١) — لا يصح الرجوع ... بعد القبض اذا وهب للفقير — [جوهرة نيرة
جلد ثاني كتاب الهبة صفحة ١٥ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٣٨]
Jawahir-i-Nayera, Vol. 2, p. 15 ; Fatawa-i-Alamgiri, Vol. 5, p. 238.

ARTICLE 462.

(مادة ١٤٢) — ولا يصح الرجوع الا بتراضيهما او بعدكم الحاكم ... واذا رجع
باحدهما ... كان فسخا ... من العمل واعادة لملكة القديم — فلو استردها بغير قضاء
ولا رضا كان غاصبا حتى لو هلك في يده ضمن قيمتها للموهوب له ... لو سأله رد العين
الموهوبة بعد قضاء القاضي بصحة الرجوع فيها فاعتنع من تسليمها فهلكت لزمه ضمها —
[قوة عيون الاخبار جلد ثاني كتاب الهبة صفحة ٣٥٥ — فتاوى عالمگیری جلد خامس
كتاب الهبة صفحة ٢٣٥ - ٢٣٨]

Kurat-ul-Ayoon, Vol. 2, p. 355 ; Fatawa-i-Alamgiri, Vol. 5, pp. 235, 238.

ARTICLE 463.

(مادة ١٤٣) — واذا وقعت الهبة بشرط العوض المعين فهي هبة ابتداء فيشتترط
التقابض في العوضين ويبطل - العوض - بالشيوخ - فيما يقسم بيع انتهاء — (اى اذا
اتصل القبض بالعوضين) فترد بالعيب وخيار الروبة وتؤخذ بالشفعة ... ولا يثبت بها
المالك قبل القبض و لكلواحد ان يمتنع من التسليم وكذا لو قبض احدهما فقط فلكل
الرجوع القابض وغيره سواء — [قوة عيون الاخبار جلد ثاني كتاب الهبة صفحة ٣٥٧ -
٣٥٨ — فتاوى عالمگیری جلد خامس كتاب الهبة صفحة ٢٤٠ - ٢٤١]

Kurat-ul-Ayoon, Vol. 2, pp. 357, 358 ; Fatawa-i-Alamgiri, Vol. 5, pp. 240, 241.

ARTICLE 464.

(مادة ١٤٤) — والصدقة كالهبّة ... لا تصح غير مقبوضة ... ولا رجوع فيها ولو
على غني — [الدرالمختار جلد ثالث كتاب الهبة صفحة ١٠٧ - فتاوى عالمگیری جلد
خامس كتاب الهبة صفحة ٢٤٨]

Durrul-Mukhtâr, Vol. 3, p. 107 ; Fatawa-i-Alamgiri, Vol. 5, p. 248.

CHAPTER IV.

الباب الرابع في الوصايا وفيه فصول

SECTION I.

الفصل الاول في حد الوصية و شرائطها و من هو اهل لها

ARTICLE 465.

(مادة ١٢٥) — الوصية ... تملك مضاف الى ما بعد الموت ... بطريق التبرع —
[البعير الرائق جلد ثامن كتاب الوصايا صفحة ١٤٥٩]

Bahrr-ul-Rayek, Vol. 8, p. 459.

ARTICLE 466.

(مادة ١٢٦) — و شرائطها كون الموصي ... اهلا للتبرع ... فلم تجز من صغير و مجنون و مكاتب ... و ... الموصي له حيا ... تحقيقا او تقديرا ... و ... الموصي به قابلا للتملك بعد موت الموصي — [رد المحتار جلد خامس كتاب الوصايا صفحة ١٤٥٢]

لا من صبي غير مميز اصلا ... و كذا لا تصح من مميز الا في تجهيزه و امر دونه ... و ان ... مات بعد الادراك او اضافها اليه ... فلا يملك تجهيزا او تعليقا — [رد المحتار جلد خامس كتاب الوصايا صفحة ١٤٥٧ - ١٤٥٨]

تصرف الصبي ... ان كان ... ضارا ... ضررا دينويا ... لا و ان اذن به وليهما —
[رد المحتار جلد خامس كتاب العجز صفحة ١١٩]

اجازة عمر رضي الله عنه لوصية ... المراهق ... محمول على انه ... كان بالغا لم يرض على بلوغه زمان كثير — [رد المحتار جلد خامس كتاب الوصايا صفحة ١٤٥٨]

لا يعجز وصية الصبي ... و كذا اذا كان مراهقا — [فتاوى قاضيخان جلد رابع كتاب الوصايا صفحة ١٢٢]

Radd-ul-Muhtâr, Vol. 5, pp. 119, 452, 457, 458; Fatawa-i-Kâzi Khan, Vol. 4, p. 422.

ARTICLE 467.

(مادة ١٢٧) — اوصي (السفينة) بوصايا في القرب و ابواب الخير جاز ذلك —
[هداية جلد ثالث كتاب العجز صفحة ٣٤١]

Hidayah, Vol. 3, p. 341.

ARTICLE 468.

(مادة ٤٦٨) — الوصية تملك ... سواء كانت ذلك في الاعيان او في المذائع —
[البحر الرائق جلد ثامن كتاب الوصايا صفحة ٤٥٩]
Bahr-ul-Rayek, Vol. 8, p. 459.

ARTICLE 469.

(مادة ٤٦٩) — و (من) شرائطها ... عدم استغراقه بالدين — [ردالمحتار
جلد خامس كتاب الوصايا صفحة ٤٥٢]
(ولو اوصى بجميع ماله وليس له وارث نفذت الوصية ولا يحتاج الى اجازة بيت
المال — [فتاوى عالمگیری جلد سابع كتاب الوصايا صفحة ٦١٤]
Radd-ul-Muhtâr, Vol. 5, p. 452; Fatawa-i-Alamgiri, Vol. 7, p. 64.

ARTICLE 470.

(مادة ٤٧٠) — و (من) شرائطها ... عدم استغراقه - اى الموصى به بالدين ...
الا باجراء الغراء — [رد المحتار جلد خامس كتاب الوصايا صفحة ٤٥٢]
Radd-ul-Muhtâr, Vol. 5, p. 452.

ARTICLE 471.

(مادة ٤٧١) — ولا تجوز الوصية للوارث ... الا ان يعجزها الورثة ... (و انما
تعتبر الاجازة بعد موت الموصي — فتاوى سراجيه حاشية قاضيهان جلد رابع كتاب
الوصايا صفحة ٤٢٣)
وفي كل موضع يحتاج الى الاجازة انما يجوز اذا كان المعجز من اهل الاجازة
و يعتبر كونه وارثا او غير وارث وقت الموت لا وقت الوصية ... وكلما جاز اجازة الوارث
... ليس للوارث ان يرجع فيه ولو اجاز البعض ورد البعض يجوز على المعجز بقدر حصته
وبطل في حق غيره — [فتاوى عالمگیری جلد سابع كتاب الوصايا صفحة ٦١٤]
Fatawa-i-Sirajiah, Vol. 4, p. 423; Fatawa-i-Alamgiri, Vol. 7, p. 64.

ARTICLE 472.

(مادة ٤٧٢) — و تجوز بالتكليف للاجنبي عند عدم المانع وان لم يعجز الوارث
ذلك لا الزيادة عايد — الا ان تعجز ورثته بعد موته (وفي كل موضع يحتاج الى الاجازة
انما يجوز اذا كان المعجز من اهل الاجازة — فتاوى عالمگیری جلد سابع كتاب الوصايا
صفحة ٦١٤) — ولا تعتبر اجازتهم حال حياته — [ردالمحتار جلد خامس كتاب الوصايا
صفحة ٤٥٣]

Fatawa-i-Alamgiri, Vol. 7, p. 64; Radd-ul-Muhtâr, Vol. 5, p. 453.

ARTICLES 473, 474.

(٤٧٣ - ٤٧٤) — ولا لوارثه وقائله (عامدا كان او خاطلا — فتاوى عالمگیری جلد سابع كتاب الوصايا صفحة ٦٤)

مباشرة ... (سواء اوصى له قبل ثم قتله — او اوصى له بعد الجرح) لا تسبا ... الا باجارة ورثته ... او يكون القاتل صديا او معزونا ... او لم يكن له وارث سواء ... اي سوى الموصى له القاتل و الوارث حتى لو اوصى لزوجته او هي له ولم يكن ثمة وارث آخر تصح الوصية — [طحطاوي جلد رابع كتاب الوصايا صفحة ٣١٧ - ٣١٨]

Fatawa-i-Alamgiri, Vol. 7, p. 64; Tahtavi, Vol. 4, pp. 317, 318.

ARTICLE 475.

(مادة ٤٧٥) — وصحت للعمل ... ان ولد العمل لاقل من ستة اشهر — لزوج العامل حيا ولوميتا — (مثل الموت الطلاق البائن) وهي معتدة حين الوصية فلاقل من سنتين — (اي من وقت الموت او الطلاق) ... من وقتها اي من وقت الوصية — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٥٥٥]

واذا ... وضعت ... ولدا ميتا فلا وصية له ... وان ولدت اثنتين احدهما حي والآخر ميت فالوصية للحي منهما وان ولدتهما حينئذ مات احدهما فان الوصية لهما نصفان وحصة الذي مات منهما ميراث لورثته — [فتاوى عالمگیری جلد سابع كتاب الوصايا صفحة ٦٥]

Radd-ul-Muhtár, Vol. 5, p. 455; Fatawa-i-Alamgiri, Vol. 7, p. 65.

ARTICLE 476.

(مادة ٤٧٦) — اوصى ... لبیت المقدس جاز ذلك و ينفق في عمارة بيت المقدس وفي سراجة ونحوه ... و... لا يتوهم انه يفترق عن المسجد — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٣]

ولو اوصى ... للرباط ... ان كان هناك دلالة يعرف بها انه اراد بهذه الوصية المقيمين عرف اليهم — [فتاوى عالمگیری جلد سابع كتاب الوصايا صفحة ٦٨]

ولو اوصى ... لاعمال البر ذكر ... ان كل ما ليس فيه تملك فهو من اعمال البر حتى يجوز صرفه الى عمارة المسجد وسراجة ... ولو اوصى ... في وجوه الخير يصرّف الى القنطرة او بناء المسجد او غلبة العلم — [فتاوى عالمگیری جلد سابع كتاب الوصايا صفحة ٦٨]

Radd-ul-Muhtár, Vol. 5, p. 463; Fatawa-i-Alamgiri, Vol. 7, p. 68.

ARTICLE 477.

(مادة ٤٧٧) — وصعت ... من المسلم للذمي وبالعكس ... والمستأمن كالذمي — [طحطاوي جلد رابع كتاب الوصايا صفحة ٣١٧]
 لواوصى له (اى ... للمستأمن) مسلم ... بوصية جاز — [هداية جلد رابع كتاب الوصايا صفحة ٧٧٤]
 و... المستأمن اذا اوصى للمسلم والذمي يصح — [طحطاوي جلد رابع كتاب الوصايا صفحة ٣١٧]
 وصية الذمي ... تجوز لذمي من غير ملته — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٨٥]
 صعت ... وصية ... مستأمن لا وارث له ... فى دارنا ... بكل ماله ... ولواوصى بنصفه مثلا نقد ورثه باقية لورثته — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٨٥]
 ولواوصى الذمي باكثر من الثلث او لبعض ورثته لا يجوز اعتبارا بالمسلمين — [هداية جلد رابع كتاب الوصايا صفحة ٧٧٤]
 ولا تجوز لورثته ... الا ان يعجزها الورثة — [هداية جلد رابع كتاب الوصايا صفحة ٧٤١]

Tahtavi, Vol. 4, p. 317; Hidayah, Vol. 4, pp. 641, 674; Radd-ul-Muhtár, Vol. 5, p. 485.

ARTICLE 478.

(مادة ٤٧٨) -- ويشترط فى الوصية القبول عربيا او لالة و ذلك بان يموت الموصى له قبل الرد والقول — [فتاوى عالمگیری جلد صانع كتاب الوصايا صفحة ٧٤]
 قبول الوصية انما يكون بعد الموت فان قبلها فى حال حياة الموصي او ردها فذلك باطل وله القبول بعد الموت — [فتاوى عالمگیری جلد صانع كتاب الوصايا صفحة ٧٤]
 تملك الوصية بالقبول بعد موت الموصي وان لم تقبض و ان ردها ارتدت — [طحطاوي جلد رابع كتاب الوصايا صفحة ٣١٨]
 فان لم يقبل بعد الموت فهي موقوفة على قبوله ليست فى ملك الوارث ولا فى ملك الموصى له حتى يقبل او يموت — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٥٤٨]
 اذا مات موصيه ثم هو بلا قبول ... ولا رد فهو اى المال الموصى به لورثته بلا قبول ... فيكون موته بلا رد كقبوله دلالة — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٥٤٨]
 هداية جلد رابع كتاب الوصايا صفحة ٧٤٢]

Fatawa-i-Alamgiri, Vol. 7, p. 64; Tahtavi, Vol. 4, p. 318; Radd-ul-Muhtár, Vol. 5, p. 458; Hidayah, Vol. 4, p. 642.

ARTICLE 479.

(مادة ٤٧٩) — و... للموصي الرجوع عنها بقول صريح أو قول... يزيل اسمه... بان يتقرر الموصى به... أو... يزيد في الموصى به ما يمنع تسليمه إلا به... وتصرف... يزيل ملكه... وكذا إذا خلطه بغيره بحيث لا يمكن تمييزه... وكذا ان امكن ولكن بعسر — [رد المحتار جلد خامس كتاب الوصايا صفحة ٤٥٨ - ٤٥٩]

Radd-ul-Muhtâr, Vol. 5, pp. 458, 459.

ARTICLE 480.

(مادة ٤٨٠) — وله الرجوع عنها... بفعل يزيد... كالباء في الدار الموصى بها بخلاف تخصيصها ومدم بنائها... و... لا يكون بجعلها راجعا فيها — [طحطاوي جلد رابع كتاب الوصايا صفحة ٣١٨ - ٣١٩]

Tahtavi, Vol. 4, pp. 318, 319.

SECTION II.

الفصل الثاني في استحقاق الموصى لهم

ARTICLE 482.

(مادة ٤٨٢) — لو اوصى الذمي بأثر من الثلث... لا يجوز اعتبارا بالمسلمين — [هداية جلد رابع كتاب الوصايا صفحة ٦٧٣]

وتجوز بالثلث للأجنبي عند عدم المانع وان لم يجز الوارث ذلك لا الزيادة عليه — [رد المحتار جلد خامس كتاب الوصايا صفحة ٤٥٣]

الوصية بأكثر من الثلث اذا لم تجز تقع بالخلعة (وانما المراد بطلان الزائد) فيجمل كانه اوصى... بالثلث — [رد المحتار جلد خامس كتاب الوصايا صفحة ٤٦٥]

Hidayuh, Vol. 4, p. 674 ; Radd-ul-Muhtâr, Vol. 5, pp. 453, 465.

ARTICLE 483.

(مادة ٤٨٣) — ومن اوصى لرجل بثلث ماله وآخر بثلث ماله ولم تجز الورثة فالثلث بينهما - لانه يضيق الثلث... وقد تساويا في سبب الاستحقاق فيستويان — [هداية جلد رابع كتاب الوصايا صفحة ٦٢٦]

وان اوصى بثلث ماله لزيد وآخر بسدس ماله فالثلث بينهما اثلاثا... فية-هان الثلث على قدر حقهما — وان اوصى لاحدهما بجميع ماله وآخر بثلث ماله ولم تجز...

فثلثه بينهما نصفان ولا يضرب الموصى له بأكثر من الثلث ... إلا في ... المحاباة والسعاية
والدراهم المرسلة ... غير المقيدة بثلث أو نصف ونحوهما — [طحاوي جلد رابع
كتاب الوصايا صفحة ٣٢٢ - ٣٢٣]

Hidayah, Vol. 4, p. 646 ; Tahtari, Vol. 4, pp. 322, 323.

ARTICLE 484.

(مادة ٤٨٤) — إذا وصى ... بجزء أو سهم - (مثله ... النصيب) - من ماله
فالبیان الى الورثة - لانه مجهول يتناول القليل والكثير ... والورثة قائمون مقام الموصي -
فيقال لهم اعطوه ما شئتم ... و ... لو وصى لرجل بسهم من ماله ولا وارث له فله النصف
لان بيت المال بمنزلة ابن فصار كان له ابنيان — [رد المحتار جلد خامس كتاب الوصايا
صفحة ٤٦٥ - ٤٦٧]

Radd-ul-Muhtâr, Vol. 5, pp. 465, 467.

ARTICLE 485.

(مادة ٤٨٥) — إذا وصى ... بثلثه لزيد وعمرو ... وعمرو ميت لزيد كل الثلث
والاصل ان الميت او المعدم لا يستحق شيئا فلا يزاحم غيره ... اما اذا خرج المزاحم
بعد صحة الإيجاب يخرج حصته ... وكذا لو مات احدهما قبل الموصي - اما بعده
فالورثة تقوم مقامه ... واصله ... انه متى دخل في الوصية ثم خرج لفقد شرط لا يوجب
الزيادة في حق الآخر ومتى لم يدخل في الوصية لفقد الاعلية كان الكل للأخر —
[رد المحتار جلد خامس كتاب الوصايا صفحة ٤٦٥ - ٤٦٩]

لو قال ثلث مالي لفلان وفلان بن عبد الله ان مات وهو فقير فمات الموصي وفلان
بن عبد الله غني كان لفلان نصف الثلث — [رد المحتار جلد خامس كتاب الوصايا
صفحة ٤٦٩]

ولو قال بين زيد وعمرو وهو ميت لزيد نصفه — [رد المحتار جلد خامس كتاب
الوصايا صفحة ٤٦٩]

Radd-ul-Muhtâr, Vol. 5, pp. 465, 469.

ARTICLE 486.

(مادة ٤٨٦) — إذا وصى — بثلث دراهمه وغنمه أو ثيابه - متفاوتة فلو تمخذه
فكالدراهم - او عبيده ان هلك ثلثاه فله جميع ما بقي في ... الدراهم والغنم ان خرج
من ثلث باقي جميع اصناف ماله ... وثلث الباقي - في الثياب والعبيد وان خرج ...
من ثلث كل المال وكالاول كل متعدد الجنس وضابطه ما يقسم جبوا وكذلك الثاني كل
مختلف الجنس وضابطه ما لا يقسم جبوا — [رد المحتار جلد خامس كتاب الوصايا
صفحة ٤٦٥ - ٤٦٨]

Radd-ul-Muhtâr, Vol. 5, pp. 465, 468.

ARTICLE 487.

(مادة ٤٨٧) — اذا اوصى ... بالف وله دين من جنس الالف وعين فان خرج الالف من ثلث العين دفع اليه والا ... فثلث العين يدفع له وكلها خرج شيء من الدين دفع اليه ثلثه حتى يستوفي حقه — [رد المحتار جلد خامس كتاب الوصايا صفحة ٤٦٥ - ٤٦٨ - ٤٦٩]

Radd-ul-Muhtâr, Vol. 5, pp. 465, 468, 469.

SECTION III.

الفصل الثالث في الوصية بالمنافع

ARTICLE 488.

(مادة ٤٨٨) — صحت الوصية ... بسكنى داره ... وكذا الوصية بغلة ... الدار - مدة معلومة وابدأ - وان اطلق فعلى الابد وان اوصى بسنين فعلى ثلاث — [رد المحتار جلد خامس كتاب الوصايا صفحة ٤٨١ - ٤٨٢]

فان كان مات الموصى له عاد - ... الى الموصى به ... الى ورثة الموصي — [هداية مع حاشية جلد رابع كتاب الوصايا صفحة ٦٦٨]

Radd-ul-Muhtâr, Vol. 5, pp. 481, 482 ; Hidayah, Vol. 4, p. 668.

ARTICLE 489.

(مادة ٤٨٩) — فان خرجت ... رقبه ... الدار في الوصية ... بالسكنى والغلة ... من الثلث سلمت ... الى الموصى له والا تخرج من الثلث تقسم الدار اثلاثا الى في مسئلة الوصية بالسكنى اما الوصية بالغلة فلا تقسم؛ الدار نفسها اما الغلة فتقسم ... هدا - الى قسمة الدار ... اثلاثا - اذا لم يكن له مال غير ... الدار والا نقسمه الدار بقدر ثلث جميع المال — [رد المحتار جلد خامس كتاب الوصايا صفحة ٤٨٢]

و ليس للورثة ان يبيعوا ما في ايديهم من ثلثي الدار — [هداية جلد رابع كتاب الوصايا صفحة ٦٦٨]

Radd-ul-Muhtâr, Vol. 5, p. 482 ; Hidayah, Vol. 4, p. 668.

ARTICLE 490.

(مادة ٤٩٠) — و ليس للموصى له ... بالسكنى ان يوجو ... الدار ... ولا للموصى له بالغلة ... سكتها — [رد المحتار جلد خامس كتاب الوصايا صفحة ٤٨٢]

Radd-ul-Muhtâr, Vol. 5, p. 482.

ARTICLES 491, 492.

(مادة ٤٩١ - ٤٩٢) — وبثمررة بستانه ثبات و... فيه ثمررة له هذه الثمررة فقط وان زاد ابدا له هذه الثمررة وما يستقبل كما في الوصية بغلة بستانه - فان له هذه وما يحدث ضم ابدا اولاً - وان لم يكن فيه - اى البستان ... ثمررة حين ... الموت ... فهي كالوصية بالغلة في تناولها الثمررة المعدومة — [رد المحتار جلد خامس كتاب الوصايا صفحہ ٤٨٣ - ٤٨٤] *Radd-ul-Muhtār, Vol. 5, pp. 483, 484.*

ARTICLE 493.

(مادة ٤٩٣) — لو اوصى بغلة نخله ... لرجل ولا شربقبتها ولم تدرى ولم تعمل فالنفقة في سقيها ... والخراج وما فيه اصلاح البستان - والقيام عليها على صاحب الرقبة ... فان اثمرت فالنفقة على صاحب الغلة ... فان حملت عاماً ثم احوالت فلم تعمل شيئاً فالنفقة على صاحب الغلة — [طحاوي جلد رابع كتاب الوصايا صفحہ ٣٣٤ - ٣٣٥] *Tahtavi, Vol. 4, pp. 334, 335.*

SECTION IV.

الفصل الرابع في تصرفات المريض

ARTICLES 494, 495.

(مادة ٤٩٤ - ٤٩٥) — يعتبر حال المقدر في تصرف منجز... فان كان في الصحة فمن كل ماله ... والمراد تصرف الذي هو انشاء ويكون فيه معنى التبرع ... والمضاي الى موته ... من الثلث وان كان في الصحة — [طحاوي جلد رابع كتاب الوصايا صفحہ ٣٢٨] *Tahtavi, Vol. 4, p. 328.*

ARTICLE 496.

(مادة ٤٩٦) — معاباته ومبته ووقفه وضمانه كل ذلك حكمه كحكم وصيته فيعتبر من الثلث... والمعابة تقع في الاجارة والاستئجار والمرو والبراء والبيع و... ما ذكره والمراد التصرف الذي هو انشاء — [طحاوي جلد رابع كتاب الوصايا صفحہ ٣٢٨] ومريض صح منه كالصحة — [طحاوي جلد رابع كتاب الوصايا صفحہ ٣٢٨] *Tahtavi, Vol. 4, p. 328.*

ARTICLE 497.

(مادة ٤٩٧) — والمقعد والمفلوج - والمسلول اذا تناول ذلك (حد التناول سنة — رد المحتار جلد خامس كتاب الوصايا صفحہ ٣٧٣)

فصار بحال لا يخاف منه الموت ... تصح هبته من جميع المال ... واما في اول ما
اصابه اذا ... صار صاحب الفراش ... يخاف به الهلاك (و ... يكون كذلك اذا كان بحال
يزداد حالا فعلا — حاشية هداية جلد رابع كتاب الوصايا صفحة ٩٥٧)

فيعتبر هبته من الثلث — [فذاوى عالميوري جلد سابع كتاب الوصايا صفحة ٧٧]

*Radd-ul-Muhtâr, Vol. 5, p. 373; Hidayah, Vol 4, p. 657; Fatawa-i-
Alamgiri, Vol. 7, p. 77.*

ARTICLE 498.

(مادة ٤٩٨) — اقراره بدين ... لغير وارث نافذ من كل ماله ... وان احاط
ذلك بماله ... ولو بعين فذلك الا اذا علم تملكه لها في مرضه — [رد المحتار جلد
رابع كتاب الاقرار صفحة ٥٠٧]

Radd-ul-Muhtâr, Vol. 4, p. 507.

ARTICLE 499.

(مادة ٤٩٩) — وان اقر المريض لوارثه ... بعين او دين بطل ... الا ان يصدقه
بقية الورثة ... ولو كان — (لو وصية) ذلك اقرارا بقبض دينه ... من وارثه و ... من
كفيل وارثه ... بخلاف اقراره ... لوارثه ... باستيلاء الدعيته ... المعروفة ... او اقر بقبض
ما كان عنده ودعيته او بقبض ما قبضه الوارث بالوكالة من مديونه — [رد المحتار جلد
رابع كتاب الاقرار صفحة ٥٠٩ - ٥١٠]

Radd-ul-Muhtâr, Vol. 4, pp. 509, 510.

ARTICLE 500.

(مادة ٥٠٠) — فلو اقر لاختيه مثلا ثم ولد له صح الاقرار لعدم ارثه - الا اذا صار
وارثا وقت الموت بسبب جديد ... فلو اقر لاختيه ثم تزوجها صح بخلاف اقراره لاختيه
المحجوب بكفر او ابن اذا زال حجبته باسلامه او يموت الابن فلا يصح لان ارثه بسبب قديم
لا جديد — [رد المحتار جلد رابع كتاب الاقرار صفحة ٥١٠]

يعتبر كونه وارثا او غير وارث عند الاقرار حتى لو اقر لغير وارث جاز وان صار وارثا
بعد ذلك لكن بشرط ان يكون ارثه بسبب حادث بعد الاقرار كما لو اقر لاختيه ثم تزوجها
بخلاف ما اذا كان السبب قائما لكن منع منه مانع ثم زال بعده كما لو اقر لابنه الكافر ...
ثم اسلم ... فانه يبطل الاقرار — [رد المحتار جلد خامس كتاب الوصايا صفحة ٤٨٤]

Radd-ul-Muhtâr, Vol. 4, p. 510; Vol. 5, p. 454.

ARTICLE 501.

(مادة ٥٠١) — ولو اقر (او وصى — رد المحتار جلد ثانى كتاب الطلاق صفحة ٥٧١)

لمن طلقها ... بائنا ... في مرض موته فلها الاقل من ... الدين و (ما ... اوصى به و من الارث — ردالمحتار جلد ثانی کتاب الطلاق صفحة ٥٧١) ... وهذا اذا كانت في العدة و طلقها بسؤالها ... و ان طلقها بلا سؤالها فلها الميراث بالغ ما بلغ - .
[ردالمحتار جلد رابع كتاب الاقرار صفحة ٥١١]

Radd-ul-Muhtâr, Vol. 4, pp. 511, 571.

ARTICLE 502.

(مادة ٥٠٢) — و ابادة مديونة و هو مديون غير جائز ... ان كان اجنبيا و ان كان وارثا فلا يجوز مطلقا سواء كان المريض مديونا اولا ... و ... سواء كان من دين له عليه اصالة او نفالة — [ردالمحتار جلد رابع كتاب الاقرار صفحة ٥٠٨]

Radd-ul-Muhtâr, Vol. 4, p. 508.

ARTICLE 504.

(مادة ٥٠٤) — ثم تقدم ديونه ... ثم ... تقدم وصيته ... ثم ... يقسم الباقي ... بين ورثته — [طحطاوي جلد رابع كتاب الفرائض صفحة ٣٦٧ - ٣٦٨ - ٣٦٩]

و دين الصقة (هو ما كان ثابتا بالبينة مطلقا بالاقرار — طحطاوي جلد رابع كتاب الفرائض صفحة ٣٦٧)

و ما لزمه في مرضه بسبب معروف ... قدم على ما اقر به في مرض موته ولو المقرب ودية ... و السبب المعروف ... ككاح مشاهد ... بمهر المثل ... وبيع مشاهد و اتلاف ... مشاهد — [ردالمحتار جلد رابع كتاب الاقرار صفحة ٥٠٧]

Tahtavi, Vol. 4, pp. 367, 368, 369; Radd-ul-Muhtâr, Vol. 4, p. 507.

ARTICLE 505.

(مادة ٥٠٥) — و المريض ليس له ان يقضي دين بعض الغرماء دون بعض ولو كان ذلك اعطاء مهر و يفاء اجرة فلا يسلم لهما ... بل يشاركهما غرماء الصقة — الا ... اذا قضى ما استقرض في مرضه او نفذ ثمن ما اشترى فيه ... بمثل القيمة ... و قد ... ثبت كل منهما بالبرهان ... بخلاف ... ما اذا لم يود حق ما مات فان البائع اسوة للغرماء ... اذا لم تكن العين المبيعة في ... يد البائع فان كانت كان الاولى — [ردالمحتار جلد رابع كتاب الاقرار صفحة ٥٠٧ - ٥٠٨]

Radd-ul-Muhtâr, Vol. 4, pp. 507, 508.

CHAPTER I.

الباب الثالث في الوصي وتصرفاته

SECTION I.

الفصل الاول في اقامة الوصي

ARTICLE 506.

(مادة ٥٠٦) — و اذا اوصى اليه فقبل قبل موته او بعده ثم ردد لم يخرج لان الموصى ما اوصى الا الى من يعتمد عليه من الاصدقاء و الاعضاء فلو اعتبر القبول بعد الموت فربما لا يقبل فلا يحصل غرضه و هو الوصي الذي اختاره — [البحر الرائق جلد ثامن كتاب الرضايا صفحة ٥٢١]

ليس للوصي اخراج نفسه بعد القبول ... و الحيلة فيه شيان ... احدهما ان يجعله وصيا على ان يعزل نفسه متى شاء — [رد المحتار جلد خامس كتاب الرضايا صفحة ١٤٨٨]

Bahrr-ul-Rayek, Vol. 8, p. 521 ; Radd-ul-Muhtâr, Vol. 5, p. 488.

ARTICLE 507.

(مادة ٥٠٧) — اوصى الى زيد اى جعله وصيا وقبل عنده صح فان رد عنده اى بعلمه يرتد و الا لا يصح الرد بغيره — [رد المحتار جلد خامس كتاب الرضايا صفحة ١٤٨٧]

Radd-ul-Muhtâr, Vol. 5, p. 487.

ARTICLE 508.

(مادة ٥٠٨) — اوصى الى زيد ... فرد ... بعلمه يرتد ... و لو قبل بعد الرد لا يصح قبوله ... الا اذا قبل في وجهه ثانيا — [طحطاوي جلد رابع كتاب الرضايا صفحة ٣٣٧]

Tahtavi, Vol. 4, p. 337.

ARTICLE 509.

(مادة ٥٠٩) — فان سكت الموصى اليه فمات موصيه فله الرد و القبول — [رد المحتار جلد خامس كتاب الرضايا صفحة ١٤٨٧]

Radd-ul-Muhtâr, Vol. 5, p. 487.

ARTICLE 510.

(مادة ٥١٠) — والقبول تارة يكون بالقول و تارة بالفعل فالقبول بالفعل كتنفيذ في وصيته او شراء شيء للورثة او قضاء دين — البحر الرائق جلد ثامن كتاب الوصايا صفحة [٥٢١ - ٥٢٢]

Bahrr-ul-Rayek, Vol. 8, pp. 521, 522.

ARTICLE 511.

(مادة ٥١١) — ولو جعل رجلا وصيا في نوع صار وصيا في الانواع كلها — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٨٧]

Radd-ul-Muhtâr, Vol. 5, p. 487.

ARTICLE 513.

(مادة ٥١٣) — وصي ابي الطفل احق بهالة من جدّه وان لم يكن وصيه فالجد ... ليس للجد بيع العقار والعروض لقضاء الدين وتنفيذ الوصايا بخلاف الوصي فان له ذلك — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٩٧]

Radd-ul-Muhtâr, Vol. 5, p. 497.

ARTICLE 514.

(مادة ٥١٤) — اشار المصنف الى شروط الولاية فالاول الحرية والثاني الاسلام والثالث العدالة فلولاى من ذكر صرح ويستبدل غيره [البحر الرائق جلد ثامن كتاب الوصايا صفحة ٥٢٣]

Bahrr-ul-Rayek, Vol. 8, p. 523.

ARTICLE 515.

(مادة ٥١٥) — يصح اخراجه عنها ولو في غيبته — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٣٨٧]

قوله يصح اخراجه اى بعد قبوله قوله ولو في غيبته ظاهرة انه يفعلزل و ان لم يبلغه العزل — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٣٨٧]

Radd-ul-Muhtâr, Vol. 5, p. 487.

ARTICLE 516.

(مادة ٥١٦) — ولو كان قادرا على التصرف امينا فيه فليس للقاضي ان يخرجها — [فتح القدير جلد رابع كتاب الوصايا صفحة ٣٠٠ — هداية جلد رابع كتاب الوصايا صفحة ٩٧٧]

عجز عن القيام بها حقيقة لا بمجرد اخباره ضم القاضي اليه غيره ... ولو ظهر للقاضي عجزه اصلا استبدل غيره — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٨٨] عجز فاقام غيره ثم قال الاول بعد ايام صرت قادرا على القيام بها قالوا هو وصي على حاله — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٨٨] لو اشتمكى الورثة او بعضهم الوصي الى القاضي لا ينبغي ان يعزله حتى يظهر له منه خيانة — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٨٨]

Hidaya, Vol. 4, p. 677; Fath-ul-Kadir, Vol. 4, p. 300; Radd-ul-Muhtâr, Vol. 5, p. 488.

ARTICLE 517.

(مادة ٥١٧) — الرابطة في مال الصغير للاب ثم وصيه ثم وصي وصيه ولو بعد فلو مات الاب ولم يوص فلولاية الابى الاب ثم وصيه ثم وصي وصيه فان لم يكن فللقاضي ومنصوبه — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٩٧]

لو كان الاب مبدرا متلفا مال ابنه فالقاضي ينصب وصيا ينزع مال الابن عن يده ويحفظه — [تنقيح الفرائى العاصديه جلد ثاني كتاب الوصايا صفحة ٣١٧]

اذا غلب وصي الميت غيبة منقطعة جاز للقاضي ان ينصب وصيا ويتوب عليه الاحكام المذكورة في وصي القاضي — [فدراى الخيرية جلد ثاني كتاب الوصايا صفحة ٢١٨]

Radd-ul-Muhtâr, Vol. 5, p. 497; Hamidiyah, Vol. 2, p. 317; Fatawa-i-Khairiah, Vol. 2, p. 218.

ARTICLE 518.

(مادة ٥١٨) — بطل فعل احد الوصيين ... اذا كانا وصيين من جهة الميت ... او قاض واحد — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٨٩]

قوله بطل فعل احد الوصيين الا اذا اجازة صاحبه فانه يجوز — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٨٩]

الا بشراء كنفه وتجهيزه والخصومة في حقوقه وشراء حاجة الطفل والاثهاب له واعتاق عبد معين ورد وديعة وتبذير وصيه معينتين ... ورد المغصوب ومشترى شراء فاسدا وقسمة كىلى او وزنى وطلب دين وقضاء دين بجنس حقه وبيع ما يخاف تلفه وجمع اموال ضائعة [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٩٠] — ولو نص على الانفرد او الاجتماع اتبع اتفاقا — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٤٩١]

Radd-ul-Muhtâr, Vol. 5, pp. 489, 490, 491.

ARTICLE 519.

(مادة ٥١٩) — في الرلو العجبة افعلوا كذا بعد موتي فالكل اوصياء و لو سكتوا حتى مات فقبل منهم اثنان او اكثر فبهم اوصياء و لو قبل واحد لم ينصرف حتى يقم القاضي معه غيره او يطلق له التصرف — [رد المختار جلد خامس كتاب الوصايا صفحہ ٤٨٧]
 الوصي اولئ باصناك المال ولا يكون المشرف وصيا و اتركونه مشرفا انه لا يجوز تصرف الوصي الا بعلمه — [رد المختار جلد خامس كتاب الوصايا صفحہ ٤٩١]

Radd-ul-Muhtâr, Vol. 5, pp. 487, 491.

ARTICLE 520.

(مادة ٥٢٠) — وصي الوصي وصي في التركيين و ان قال في تركتي —
 [رد المختار جلد خامس كتاب الوصايا صفحہ ٤٩١ - ٤٩٢]
 وصي وصي القاضي كوصية الوصية عامة — [الدر المختار جلد خامس كتاب الوصايا صفحہ ٥٠٣]

Radd-ul-Muhtâr, Vol. 5, pp. 491, 492 ; Durru'l-Mukhtâr, Vol. 5, p. 503.

SECTION II.

الفصل الثاني في تصرفات الوصي

ARTICLE 521.

(مادة ٥٢١) — قال المتأخرون من اصحابنا لا يجوز للوصي بيع عقار الصغير الا ان يكون على الميت دين او يرغب المشتري فيه بضعف الثمن او يكون للصغير حاجة الى الثمن — [البحر الرائق جلد ثامن كتاب الوصايا صفحہ ٥٣٣]
 الوصي يملك بيع عروض الصغير من غير حاجة — [تنقيح الفتاوى العاصدية جلد ثانی کتاب الوصايا صفحہ ٣٢٢]

او دين الميت (يبيع بقدر الدين على المفتي به — رد المختار جلد خامس كتاب الوصايا صفحہ ٤٩٤) او وصيته مرسلة لانفاذ لها الا منه او لكون غلاته لا تزيد على مؤنته او خوف خرابه او نقصانه او كونه في يد متعلب — [رد المختار جلد خامس كتاب الوصايا صفحہ ٤٩٤ - ٤٩٥]

صرح في التتارخانية انقلا عن المنتقي ان يبيع و الحال هذه بالغل — [الفتاوى البغديرية جلد ثاني كتاب الوصايا صفحہ ٢١٧]

الشجر من قبل المنقول لا من قبيل العقار كما صرح به في البحر نقلا عن الأئمة
الاختيار و ابطال قول من جعل البناء والنخيل من العقار — [الفتاوى الخيرية جلد
ثاني كتاب الوصايا صفحة ٢١٧ - ٢١٨]

Bahrr-ul-Rayek, Vol. 8, p. 533 ; *Hamidiah*, Vol. 2, p. 322 ; *Radd-ul-Muhtâr*, Vol. 5, pp. 494, 495 ; *Fatawa-i-Khairiah*, Vol. 2, pp. 217, 218.

ARTICLE 522.

(مادة ٥٢٢) — اذا لم يكن على الميت دين ولا وصية فان الورثة كبارا حضورا
لا يبيع شيئا ولو غيبا له بيع العروض فقط ... جاز بيعه — اى الرضى على الكبير الغائب
في غير العقار الا للدين — [رد المحتار جلد خامس كتاب الوصايا صفحة ٤٩٤]

Radd-ul-Muhtâr, Vol. 5, p. 494.

ARTICLE 523.

(مادة ٥٢٣) — اذا لم يكن على الميت دين ولا وصية فان ... البعض صفارا
و البعض كبارا ... فعندهما يبيع نصيب الصغار ولو من العقار دون الكبار الا اذا كانوا غيبا
فيبيع العروض وقولهما القياس — [رد المحتار جلد خامس كتاب الوصايا صفحة ٤٩٤]

Radd-ul-Muhtâr, Vol. 5, p. 494.

ARTICLE 524.

(مادة ٥٢٤) — اذا كان على الميت دين او وصية ولم تقض الورثة
الديون ولم ينفذوا الوصية من مالهم فانه يبيع التركة كلها ان كان الدين معبطا بمقدار
الدين ان لم يعط ... وينفذ الوصية بمقدار الثلث — [رد المحتار جلد خامس
كتاب الوصايا صفحة ٤٩٤]

Radd-ul-Muhtâr, Vol. 5, p. 494.

ARTICLE 525.

(مادة ٥٢٥) — ان وصي الميت يملك بيع التركة لقضاء دين الميت بخلاف
الجد — [رد المحتار جلد خامس كتاب الوصايا صفحة ٥٠٤]
ثم ان بيع الجد انما يجوز لنحو النفقة والدين على الصغار لا للدين الذي على
الميت او لتنفيذ وصاياه — [رد المحتار جلد خامس كتاب الوصايا صفحة ٥٠٥]
يرفع الغرماء امرهم الى القاضي ليبيع لهم بقدر ديونهم وكذا الموصى لهم —
[رد المحتار جلد خامس كتاب الوصايا صفحة ٤٩٧]

Radd-ul-Muhtâr, Vol. 5, pp. 497, 504, 505.

ARTICLE 526.

(مادة ٥٢٦) — فانهما لا يملكان بيع العقار مطلقا ولا شراء غير طعام و كسوة —
[رد المحتار جلد خامس كذاب الوصايا صفحة ٤٩٥]

و اما وصي الاخ و الام و العم و سائر ذوى الارحام ... ان لهم بيع تركة الميت لدينه
او وصيته ان لم يكن احد ممن تقدم لا بيع عقار الصغار اذ ليس لهم الا حفظ المال ولا
الشراء للتجارة ولا التصرف فيما يملك الصغير من جهة موصيهم مطلقا ... نعم لهم شراء
ما لا بد منه من الطعام و الكسوة و بيع منقول و رثة اليتيم من جهة الموصي — [رد المحتار
جلد خامس كتاب الوصايا صفحة ٤٩٧]

Radd-ul-Muhtâr, Vol. 5, pp. 495, 497.

ARTICLE 527.

(مادة ٥٢٧) — ولا يتعز الوصي في ... مال اليتيم لنفسه ... و جاز لو اتجر من
مال اليتيم لليتيم — [در المختار جلد خامس كتاب الوصايا صفحة ٤٩٥]

الوصي يملك ما هو خير لليتيم — [الفتاوى الخيرية در حاشية تنقيح الفتاوى
العامة جلد ثاني كتاب الوصايا صفحة ٣٣٧]

Fatawa-i-Khairiah, Vol. 2, p. 337.

ARTICLE 528.

(مادة ٥٢٨) — الوصي يملك بيع عروض الصغير من غير حاجة ولا يملك بيع
عقاره الا لحاجة — [تنقيح الفتاوى العامة جلد ثاني كتاب الوصايا صفحة ٣٣٤]

يجوز بيع الوصي وشراءه بالغبن اليسير ولا يجوز بالفاحش — [تنقيح الفتاوى
العامة جلد ثاني كتاب الوصايا صفحة ٣٣٣]

باع (الوصي) ممن لا تقبل شهادته له او من وارث الميت لا يجوز — [رد المحتار
جلد خامس كتاب الوصايا صفحة ٢٩٣]

ليس لوصي القاضي الشراء لنفسه ولا ان يبيع ممن لا تقبل شهادته له —
[رد المحتار جلد خامس كتاب الوصايا صفحة ٥٠٢]

Fatawa-i-Khairiah, Vol. 2, pp. 323, 324; Radd-ul-Muhtâr, Vol. 5, pp. 493, 502.

ARTICLE 529.

(مادة ٥٢٩) — اذا باع الوصي شيئا من تركة الميت بالنسيئة فان كان ذلك ضررا
على اليتيم بان يخشى عليه الجعود و المنع عنه حلول الاجل لا يجوز وان لم يكن ضررا

على اليتيم بان كان لا يغشى عليه الجعود و المنع عند حلول الاجل يجوز — [فتاوى عالمگیری جلد سابع کتاب الوصايا صفحہ ۱۰۳]

Fatawa-i-Alamgiri, Vol. 7, p. 103.

ARTICLE 530.

(ماده ۵۳۰) — و ان باع الوصي او اشترى مال اليتيم من نفسه ... ان كان وصي الاب جاز بشرط منفعة طاعرة للصغير — [در المختار جلد خامس کتاب الوصايا صفحہ ۳۹۳]
تفسير المنفعة الطاعرة ان يبيع ما يساوي خمسة عشر بعشرة من الصغير او يشتري ما يساوي عشرة بخمسة عشر لنفسه من مال الصغير ... في غير العقار و اما في العقار فلا شك ان الخيرية في الشراء التضعيف وفي البيع التخصيف — [رد المختار جلد خامس کتاب الوصايا صفحہ ۱۴۳]

فان كان وصي الفاني لا يجوز ذلك مطلقاً — [رد المختار جلد خامس کتاب الوصايا صفحہ ۱۴۳]

Durrul-Mukhtâr, Vol. 5, p. 493; Radd-ul-Muhtâr, Vol. 5, pp. 493.

ARTICLE 531.

(ماده ۵۳۱) — لو قضى الوصي دين نفسه بمال اليتيم لا يجوز ... الوصي اذا اراد ان يقرض مال اليتيم من غيره فليس له ذلك — [فتاوى عالمگیری جلد سابع کتاب الوصايا صفحہ ۱۰۴]

ولا يقرض الوصي مال اليتيم لا من نفسه ولا من غيره — [تنقيح الفتاوى الحامدية جلد ثاني کتاب الوصايا صفحہ ۳۲۹]

لو رهن الوصي ... مال اليتيم ... يجوز في الاستحسان — [فتاوى عالمگیری جلد سابع کتاب الوصايا صفحہ ۱۰۴]

للاب رهن ماله عند ولده الصغير بدين له اى للصغير عليه اى على الاب ... بخلاف الوصي فانه لا يملك ذلك ... و كذا عكسه فاللاب رهن متاع طفله من نفسه ... بخلاف الوصي — [رد المختار جلد خامس کتاب الرهن صفحہ ۳۴۸]

ان للوصي ان يأخذ الكفيل بدين الميت — [البحر الرائق جلد ثامن کتاب الوصايا صفحہ ۵۴]

Fatawa-i Alamgiri, Vol. 7, p. 104; Tankihul Hamidiyah, Vol. 2, p. 329; Radd-ul-Muhtâr, Vol. 5, p. 348; Bahrr-ul-Rayek, Vol. 8, p. 534.

ARTICLE 532.

(ماده ۵۳۲) — المصرح به في الكتب جواز توكيله (اى الوصي) بكل ما يجوز له — [فتاوى الخيرية جلد ثاني کتاب الوصايا صفحہ ۲۱۹]

Fatawa-i-Khairiah, Vol. 2, p. 219.

ARTICLE 533.

(مادة ٥٣٣) — الوصي لا يملك ابراء غريم الميت ولا ان يعط عنه شيئاً ولا يؤجله اذا لم يكن الدين واجباً بعقده فان كان واجباً بعقده صح العط والتأجيل والابراء ... ويكون ضامناً — [فتاوى عالمگیری جلد صابع كذاب الرصايا صفحة ١٠٥]

Fatawa-i-Alamgiri, Vol. 7, p. 105.

ARTICLE 534.

(مادة ٥٣٤) — ولو صالح الوصي واحداً عن دين الميت ان كان للميت دينه على ذلك او كان الخصم مقراً بالدين او كان القاضي علم بذلك الحق لا يجوز صلح الوصي وان لم يكن على الحق دينه جاز صلح الوصي — وان كان الصلح عن دين على الميت او على اليتم فان كان للمدعي دينه على حقه او كان القاضي قضى له بعقده جاز صلح الوصي — [فتاوى عالمگیری جلد صابع كذاب الرصايا صفحة ١٠٥]

Fatawa-i-Alamgiri, Vol. 7, p. 105.

ARTICLE 535.

(مادة ٥٣٥) — ولا يجوز اقراره بدين على الميت ولا بشيء من تركته انه لفلان — [رد المحتار جلد خامس كتاب الرصايا صفحة ٤١٦]

Radd-ul-Muhtâr, Vol. 5, p. 496.

ARTICLE 536.

(مادة ٥٣٦) — احد الورثة اقر بالدين ... يلزمه ... حصته ... احد الورثة لو اقر بالوصية يؤخذ منه ما يخصه — [رد المحتار جلد رابع كتاب الاقراء صفحة ٥٠١]

Radd-ul-Muhtâr, Vol. 4, p. 501.

ARTICLE 537.

(مادة ٥٣٧) — للوصي ان لا يضيق على الصغيرة في النفقة بل يوسع عليه بلا اسراف وذلك يتفاوت بقله ماله وكثرته فينظر الى ماله وينفق بحسب حاله — [رد المحتار جلد خامس كتاب الرصايا صفحة ٥٠٠]

Radd-ul-Muhtâr, Vol. 5, p. 500.

ARTICLE 538.

(مادة ٥٣٨) — انفق الوصي من مال نفسه على الصبي والصبي مال غائب فهو متطوع ... الا ان يشهد ... انه يرجع به عليه — [رد المحتار جلد خامس كتاب الرصايا صفحة ٤٩٨]

وتجب النفقة ... لطفله ... الفقير ولو لم يتيسر انفق عليهم القريب —
[رد المحتار جلد ثاني كتاب الطلاق صفحه ٧٢٧ - ٧٢٨]

ولو اشترى لطفله ثوبا او طعاما واشهد انه يرجع به عليه يرجع لوله مال والا لا
لوجوبهما عليه حينئذ — [رد المحتار جلد خامس كتاب الوصايا صفحه ٥٠٥]
Radd-ul-Muhtâr, Vol. 5, pp. 498, 505 ; Vol. 2, pp. 727, 728.

ARTICLE 539.

(ماده ٥٣٩) — وان كان الصالح عن دين على الميت ... فان لم يكن للمدعي
بيئة على حقه ولا قضى القاضي بذلك لا يجوز — [فتاوى عالمگیری جلد سابع كتاب
الوصايا صفحه ١٠٥]

ولا يجوز اقارة بدين على الميت ... فلا يجوز للمقر له اخذه حتى يقيم برهانا
ويعلم يميناً ويضمن الوصي لو دفع الى المقر له — [رد المحتار جلد خامس كتاب
الوصايا صفحه ١٩٦]

Fatawa-i-Alamgiri, Vol. 7, p. 105 ; Radd-ul-Muhtâr, Vol. 5, p. 496.

ARTICLE 540.

(ماده ٥٤٠) — للوصي ان يأكل من مال الصبي بالمعروف اذا كان محتاجا
اليه — [فتاوى سراجيه در حاشية قاضيان كتاب الوصايا صفحه ١٣٥ - ١٣٦ — فتاوى
قاضيان جلد رابع كتاب الوصايا صفحه ١٣٨]

Fatawa-i-Siragiah, pp. 435, 436 ; Fatawa-i-Kazi Khan, Vol. 4, p. 438.

ARTICLE 541.

(ماده ٥٤١) — كبر الصغار واتموا الوصي ... يجب على الوصي اليمين على
دعواه ... وهذا اذا ادعى نفقة المثل او ازيد يسيروا الا فلا يصدق ويضمن ما لم
يفسر دعواه بتفسير محتمل ... فيصدق يمينه — [رد المحتار جلد خامس كتاب الوصايا
صفحه ٥٠٠]

والاصل ان كل شئ كان مسلطا عليه فانه يصدق فيه — اي يمينه اذا لم يكذب
الظاهر — [رد المحتار جلد خامس كتاب الوصايا صفحه ٥٠١]

Radd-ul-Muhtâr, Vol. 5, pp. 500, 501.

ARTICLE 542.

(ماده ٥٤٢) — لو مات الوصي مجهلا لا ضمان عليه — [حموى كتاب الفرائض
صفحه ١٤٦٩]

Hamavi, p. 469,

ARTICLES 543, 544.

(مادة ٥٣٥ - ٥٣٤) — الاصل ان كل شيء كان مسلطا عليه فانه يصدق فيه -
اي يمينه — وما لا فلا — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٥٠١]

Radd-ul-Muhtâr, Vol. 5, p. 501.

ARTICLE 545.

(مادة ٥٤٥) — قوله فانه يصدق فيه اي يمينه اذا لم يكذبه الظاهر —
[ردالمحتار جلد خامس كتاب الوصايا صفحة ٥٠١]

Radd-ul-Muhtâr, Vol. 5, p. 501.

ARTICLE 546.

(مادة ٥٤٦) — يقبل قول الوصي فيما يدعيه ... الا في مسائل ... ادعى قضاء
دين الميت ... بغير امر القاضي ... ضمن ... لو لم يجد يمينه — او ادعى قضاء من
ماله ... او ان اليتيم استهلك ... مال آخر ... وصورتها قال له انك استهلكت مال فلان
في صغر فاديتك من مالك (وقضيتك عنك — طحطاوي جلد رابع كتاب الوصايا
صفحة ٥٤٥)

فكذبه ... فالوصي ضامن الا ان يبرهن ... او اذن له بتجارة فركبه ديون فقضاء
عنه لو ادعى خراج ارضه في وقت لا يصاح للزراعة ... فلا بد له من البيعة ... او الانفاق
على معتمده ... فلا يقبل قول الوصي ... ويكون ضامنا للمال ما لم يقيم البيعة —
وانه زوج اليتيم امرأة ودفع مهرها من ماله وهي ميتة ... اتجرو ربح ثم ادعى انه كان
مضاربا — [ردالمحتار جلد خامس كتاب الوصايا صفحة ٥٠٠ - ٥٠١]

Tahtavi, Vol. 4, p. 345 ; Radd-ul-Muhtâr, Vol. 5, pp. 500, 501.

ARTICLE 547.

(مادة ٥٤٧) — ادرك اليتيم لم يجعل الوصي بدفع المال اليه بل يتأنى ويعبره
بالشئ بعد الشئ فان وجده مصلحا دفع اليه ماله — [طحطاوي جلد رابع كتاب
العجز صفحة ٨٥]

Tahtavi, Vol. 4, p. 85.

ARTICLE 548.

(مادة ٥٤٨) — ان ظهور زوال السفه فيما اذا كان قبل الحكم ... اما بعد
الحكم ... فقد تأكد وثبت ... فبعد العجز من القاضي ... الظاهر بقاؤه — [ردالمحتار
جلد خامس كتاب العجز صفحة ١٠٤ - ١٠٥]

Radd-ul-Muhtâr, Vol. 5, pp. 104, 105.

ARTICLE 549.

(مادة ٥٤٩) — فان بلغ الصبي غير رشيد لم يسلم اليه ماله حتى يبلغ خمساً وعشرين سنة ... ما لم يونس رشده قبلها — [ردالمحتار جلد خامس كتاب الحجر صفحہ ١٠٢ - ١٠٣]

Radd-ul-Muhtâr, Vol. 5, pp. 102, 103.

ARTICLE 550.

(مادة ٥٥٠) — لو بلغ مفسداً ... فسلمه اليه فضاع ضمنه الوصي ... وكما يضمن بالدفع اليه وهو مفسد فكذا قبل ظهور رشده بعد الادراك — [ردالمحتار جلد خامس كتاب الحجر صفحہ ١٠٢]

Radd-ul-Muhtâr, Vol. 5, p. 102.

ARTICLE 551.

(مادة ٥٥١) — ولو دفعه اليه وهو صبي مصلح ... فضاع في يده لم يضمن — [ردالمحتار جلد خامس كتاب الحجر صفحہ ١٠٢]

Radd-ul-Muhtâr, Vol. 5, p. 102.

ARTICLE 552.

(مادة ٥٥٢) — من بلغت وعليها وصي هل يثبت رشدها بمجرد البلوغ ام لابد من البينة فاجاب بانه لا يثبت الا ببينة شرعية ... وبعده يسلم اليه ... لو منعه منه بعد طلبه ضمن ... اذا هلك في يده — [ردالمحتار جلد خامس كتاب الحجر صفحہ ١٠٢ - ١٠٣]

Radd-ul-Muhtâr, Vol. 5, pp. 102, 103.

CHAPTER IV.

الباب الرابع في الحجر والمراهقة والبلوغ

SECTION I.

الفصل الاول في الحجر

ARTICLE 553.

(مادة ٥٥٣) — الحجر ... سببه صغر وجنون يعم ... الممتوّة ... و ... يحجر ... بالسفه والغفلة ... والدين — [ردالمحتار جلد خامس كتاب الحجر صفحہ ٩٧ - ٩٨]

Radd-ul-Muhtâr, Vol. 5, pp. 97, 98, 101.

ARTICLE 554.

(مادة ٥٨٤) — العَجَر ... هو منع عن التصرف قولا ... بصغر ... و جنون ...
 فلا يصح تصرف صبي ... ولا يصح تصرف المجنون المغلوب بحال ... و ان كان يجهن تارة
 و يفتيق اخرى فهو في حال افاقته كالعاقل — [البحر - رائق جلد ثامن باب العَجَر -
 صفحة ٨٨ - ٨٩]

Bahrr-ul-Rayek, Vol. 8, pp. 88, 89.

ARTICLES 555, 556, 557.

(مادة ٥٥٥ - ٥٥٦ - ٥٥٧) — و تصرف الصبي و المعتوه الذي يعقل - (صفحة
 لكل من الصبي و المعتوه) ... ان كان نائعا مَعْضَا ... صح بلا انن ... و ان ضارا (من
 كل وجه — رد المحتار جلد خامس كتاب العَجَر صفحة ١١٩)
 لا و ان انن به وليها و ما تردد ... بين نفع و ضرر ... توقف على الانن -
 [طحطاوي جلد رابع كتاب العَجَر صفحة ٩٧]

اجاز وليه اورد — [رد المحتار جلد خامس كتاب العَجَر صفحة ٩٩]

Radd-ul-Muhtâr, Vol. 5, pp. 99, 119; Tahtavi, Vol. 4, p. 97.

ARTICLE 558.

(مادة ٥٥٨) — فلوان ابن يوم انقلب على قابضة انسان مثلا فكسرهما يجسب
 الضمان عليه في العَدَل — [رد المحتار جلد خامس كتاب العَجَر صفحة ٩٩]
 و المعتوه كالصبي — [البحر الرائق جلد ثامن باب العَجَر صفحة ٨٩]

Radd-ul-Muhtâr, Vol. 5, p. 99; Bahrr-ul-Rayek, Vol. 8, p. 89.

ARTICLE 559.

(مادة ٥٥٩) — الصبي المَعْجُور مواخذ بافعاله (و المعتوه كالصبي — البحر
 الرائق جلد ثامن باب العَجَر صفحة ٨٩)

فيضمن ... و اذا قتل فالدية على عاقلته ... (وليس التقييد بالعَجَر في هذه
 احترازا حتى لو كان ماذونا له ... فالحكم كذلك) - الا في مسائل لو ائلف ما اقتضه
 و ما اودع عنده بلا انن وليه - (قيد بعدم الاذن لانه لو انن له وليه في اخذ الوديعة
 يضمن ... و الاولى حذف قوله بلا انن وليه و يكون قوله بعد بلا انن راجعا الى المسائل
 الاربعة) و ما اعير له و ما بيع منه بلا انن — [طحطاوي جلد رابع كتاب العَجَر صفحة

[٨٣ - ٨٢]

Bahrr-ul-Rayek, Vol. 8, p. 89; Tahtavi, Vol. 4, pp. 82, 83.

ARTICLES 560, 561.

(مادة ٥٦٠ - ٥٦١) و ... يعجز على العجز بالسفح ... بقضاء القاضي ... فيكون
في احكامه كصغير (اى يعقل — رد المحتار جلد خامس باب العجز صفحة ١٠١)

ثم ماذا ... في تصرفات تحمل الفسخ و يبطلها الهزل و اما ما لا يحتمله ولا يبطله
الهزل فلا يعجز عليه ... فلذا قال الا في نكاح و طلاق ... و زوال ولاية ابيه و جدته و في
صحة اقراره ... على نفسه بوجوب القصاص في النفس او فيما دونها ... و في الاتفاق ...
على ... من تجب عليه نفقته - و في صحة وصاية بالقرب من الثلث (يعنى اذا كان
له وارث) — [رد المحتار جلد خامس باب العجز صفحة ١٠٢ — طحاوي جلد
رابع كتاب العجز صفحة ٨٤ - ٨٥]

Radd-ul-Muhtâr, Vol. 5, pp. 101, 102; Tahtavi, Vol. 4, pp. 84, 85.

ARTICLE 562.

(مادة ٥٦٢) — يمنع مفت ما جن يعلم الحيل الباطلة — و ... الذي يفتي
عن جمل ... و طبيب جامل و مكار مفلس ... والعق بهذه ... المحتكر — [رد المحتار
جلد خامس كتاب العجز صفحة ١٠١]

Radd-ul-Muhtâr, Vol. 5, p. 101.

ARTICLE 563.

(مادة ٥٦٣) — لا باس ... ان يدفع اليه شيئا من ماله و يأذن له بالتجارة ...
و الواجب على الوصي ان لا يدفع اليه المال الا بعد الاختيار — [رد المحتار جلد خامس
كتاب العجز صفحة ١٠٢ - ١٠٣]

و الشرط لصحة الاذن ان يعقلا البيع سالبا للمالك ... و الشراء جالبا له ... و يعرف
الغبين اليسير من الفاحش و هو ظاهر — [رد المحتار جلد خامس كتاب العجز
صفحة ١١٩ — ١٢٠]

Radd-ul-Muhtâr, Vol. 5, pp. 102, 103, 119, 120.

ARTICLE 564.

(مادة ٥٦٤) — فلواذن مطلقا ... صح كل تجارة منه ... فيبيع و يشتري ولو
بغبين فاحش ... و يوكل بهما و يرهن و يرهن و يعير ... و يصلح ... و يأخذ الارض اجارة
و مساقاة و مراعاة ... و يوجر ... و يقر بوديعة ... و دين ... و يحط من الثمن بعب
... و يعاني و يؤجل ... و لا ينزج الا باذن ... و لا يقرض ولا يهب ... و لا يقبل ...
و ... الصبي ... كعبد ماذون في كل احكامه ... الا ان الولي لا يمنع من التصرف في

ماله — [رد المحتار جلد خامس كتاب الماذون صفحہ ۱۰۸ - ۱۰۹ - ۱۱۰ - ۱۱۱ -
[۱۱۳ - ۱۱۲

Radd-ul-Muhtâr, Vol. 5, pp. 108, 109, 110, 111, 112, 113.

SECTION II.

الفصل الثاني في سن التميز والمراهقة والبلوغ

ARTICLE 565.

(مادة ۵۶۵) — و العاضنة ... احق ... بالغلام حتى يستغني عن النساء وقدر
يسع — [رد المحتار جلد ثاني كتاب الطلاق صفحہ ۶۹۴]
و ... بالجارية حتى ... بلغت حد الشووة (وقدر يتسع) — [رد المحتار جلد
ثاني كتاب الطلاق صفحہ ۶۹۵ — فتاوى عالمگیری جلد ثاني كتاب الطلاق صفحہ ۱۶۶]
و ادنى مدة له اثنتا عشرة سنة و لها تسع سنين ... فان راحقا بان بلغا هذه السن
الخ — [رد المحتار جلد خامس كتاب العجر صفحہ ۱۰۵]

Radd-ul-Muhtâr. Vol. 2, pp. 694, 695, and Vol. 5, p. 105. Fatawa-i-Alamgiri, Vol. 2, p. 166.

ARTICLE 566.

(مادة ۵۶۶) — بلوغ الغلام بالاحتلام و الاحبال و الانزال ... و الجارية بالاحتلام
و العيض و العبل ... فان لم يوجد فيهما شيء فعتى يتم لكل منهما خمس عشرة
سنة — [رد المحتار جلد خامس كتاب العجر صفحہ ۱۰۵]
Radd-ul-Muhtâr, Vol. 5, p. 105.

ARTICLE 567.

(مادة ۵۶۷) — ولا تجبر البالغة - ولا العور البالغ ... على النكاح لانقطاع
الولاية بالبلوغ — [رد المحتار جلد ثاني كتاب النكاح صفحہ ۳۲۳]
لولى الصغير و الصغيرة ان ينكحهما و ان لم يرضيا بذلك ... المعتوة و المعتوفة
و المجنون و المجنونة كالصغير و الصغيرة — [فتاوى عالمگیری جلد ثاني باب الولي
صفحہ ۱۲]

و ... اذا بلغ ... منعه قبل ان ينكشف حاله و يعلم رشده و صلاحيته بالاختبار ...
و الواجب ... ان لا يدفع اليه المال الا بعد اختبار — [رد المحتار جلد خامس كتاب
العجر صفحہ ۱۰۳]

Radd-ul-Muhtâr, Vol. 2, p. 323, and Vol. 5, p. 103. Fatawa-i-Alamgiri, Vol. 2, p. 12.

ARTICLES 568, 569.

(مادة ٥٦٨ - ٥٦٩) — ولا خيار للولد ... اى اذا بلغ السن الذي يزعم من الام يأخذ الاب ولا خيار للصغير ... ذكرا كان او انثى ... وهذا قبل البلوغ اما بعده فيخير بين ابويه وان اراد الانفرد فله ذلك ... ثم الغلام اذا بلغ رشيدا فله ان ينفرد الا ان يكون مفسدا مخوفا عليه — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٦٩٥ - ٦٩٦]

Radd-ul-Muhtâr, Vol. 2, pp. 695, 696.

ARTICLE 570.

(مادة ٥٧٠) — بلغت الجارية مبالغ النساء ان بكرأ ضمها الاب الى نفسه الا اذا دخلت في السن واجتمع لها رأى فتسكن حيث احبت ... وان ثيبا لا يضمها الا اذا لم تكن مأمونة على نفسها فالاب ... ولاية الضم ... والجد بمنزلة الاب ... فيما ذكر ... من احكام البكر والثيب — [ردالمحتار جلد ثاني كتاب الطلاق صفحہ ٦٩٥ - ٦٩٦]

Radd-ul-Muhtâr, Vol. 2, pp. 695, 696.

CHAPTER V.

الفصل الخامس في احكام المفقود

ARTICLE 571.

(مادة ٥٧١) — المفقود هو غائب لا يدري مكانه ولا حياته ولا موته — [ردالمحتار جلد ثالث كتاب المفقود صفحہ ٣٥٨]

Radd-ul-Muhtâr, Vol. 3, p. 358.

ARTICLE 572.

(مادة ٥٧٢) — لو كان له وكيل له حفظ ماله ... على ما اذا رأى المصلحة في ذلك ... ولا ينزعزل بفقد المؤمل ... و... ليس للورثة ... نزع مال المفقود ... اودعه بنفسه ... ليس لامين بيت المال نزع من يد من بيده ... امنه قيل زهابه — وان كان المفقود لا وارث له الا بيت المال ... فلوله وكيل فله حفظ ماله لا تميم داره ... عند الحاجة ... الا باذن الحاكم — [ردالمحتار جلد ثالث كتاب المفقود صفحہ ٣٥٨]

Radd-ul-Muhtâr, Vol. 3, p. 358.

ARTICLE 573.

(مادة ٥٧٣) — ينصب القاضي ... وكذا اذا لم يكن له وكيل ... يأخذ حقه كغلاته وديونه التي اقر بها غرمائه ... و يحفظ ماله ويقرم عليه — [ردالمحتار جلد ثالث كتاب المفقود صفحة ٣٥٨]

Radd-ul-Muhtâr, Vol. 3, p. 358.

ARTICLE 574.

(مادة ٥٧٤) — للقاضي بيع مال المفقود ... من المتاع ... و العقار ... اذا خيف عليه الفساد ... و يحفظ ثمنه ... فان ظهر حيا فله الثمن ... او ... الى من يرث ... بموته ... ولا يبيع القاضي ما لا يخاف فسادا في نفقة ولا في غيرها — [ردالمحتار جلد ثالث كتاب المفقود صفحة ٣٥٩ - ٣٦١]

Radd-ul-Muhtâr, Vol. 3, pp. 359, 361.

ARTICLE 575.

(مادة ٥٧٥) — الوكيل المنصوب ... ينفق ... على عرسه وقريبه ولداً وهم اصوله وفروعه ... من مال المفقود الحاصل في بيته و الواصل من ثمن ما يتسارع اليه الفساد ومن مال مودوع عند مقرودين على مقر — [ردالمحتار جلد ثالث كتاب المفقود صفحة ٣٥٩]

Radd-ul-Muhtâr, Vol. 3, p. 359.

ARTICLE 576.

(مادة ٥٧٦) — المفقود ... يعتبر حيا في حق الاحكام التي تضره وهي المتوقفة على ثبوت موته ... فلا ينكح عرسه غيره ولا يقسم ماله ... ولا تفسخ اجارته ... ولا يعوق بينه وبينها ... او بعد مضي اربع سنين — [ردالمحتار جلد ثالث كتاب المفقود صفحة ٣٥٨ - ٣٥٩]

Radd-ul-Muhtâr, Vol. 3, pp. 358, 359.

ARTICLE 577.

(مادة ٥٧٧) — المفقود ... يعتبر ميتا فيما ينفعه ويضر غيره وهو ما يتوقف على حياته ... فلا يرث من غيره ... ولا يحكم باستحقاقه للوصية ... اذا مات الموصي بل يتوقف قسمة ... الى ظهور الحال ... او ... يحكم بموته — [ردالمحتار جلد ثالث كتاب المفقود صفحة ٣٥٨ - ٣٦٠]

Radd-ul-Muhtâr, Vol. 3, pp. 358, 360.

ARTICLE 578.

(مادة ٥٧٨) — انما يحكم بموته بقضاء ... الى موت اقرانه في بلده ... اي وقت رأى المصلحة حكم بموته و يقدر بتسعين سنة ... من حين ولادته ... التفحص

من موت الاقران غير ممكن — [ردالمحتار جلد ثالث كتاب المفقود صفحة ٣٦٠ - ٣٦١]

Radd-ul-Muhtâr, Vol. 3, pp. 360, 361.

ARTICLE 579.

(مادة ٥٧٩) — حين حكم بموته ... يقسم ماله بين من يرثه الآن ... من حين فقده فيرد الموقوف له الى من يرث مورثه عند موته ... ويرد قسطه من الوصية الى ورثة الموصي ... فتعذر منه مرسعة ... عدة الوفاة (فتقزوج — فتح القدير جلد ثاني صفحة ٨٠٩) — [ردالمحتار جلد ثالث كتاب المفقود صفحة ٣٦١ - ٣٦٢]

Fath-ul-Kadir, Vol. 2, p. 809 ; Radd-ul-Muhtâr, Vol. 3, pp. 3, 361, 362.

ARTICLE 580.

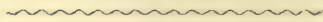
(مادة ٥٨٠) — وان علم حياته ... او ظهر ... حيا ... في وقت من الاوقات يرث من مات قبل ذلك الوقت من اقاربه لكن لو عاد حيا بعد الحكم بموته ... فالباقى في يد ورثته له ولا يطالب بها ذهب — [ردالمحتار جلد ثالث كتاب المفقود صفحة ٦١]

Radd-ul-Muhtâr, Vol. 3, p. 61.

ARTICLE 581.

(مادة ٥٨١) — اذا قامت بينة ... لاثبات دعوى موته من زوجته او احد ورثته او غريمه ... ثم ... ان يجعل القاضي من في يده المال خصما عنه ... و ... اذا لم يكن له وكيل ... ينصب عليه قيما تقبل عليه البينة — [ردالمحتار جلد ثالث كتاب المفقود صفحة ٣٦١]

Radd-ul-Muhtâr, Vol. 3, p. 361.



GENERAL INDEX.

A

	<i>Page.</i>
Acceptance—	
declaration and, essential in a valid marriage 	4
words of proposal and, of marriage by and before whom to be made ...	5
declaration and, of marriage where both the contracting parties are present 	6
not to vary from declaration in contract of marriage 	6
tacit, of executorship is equivalent to express acceptance 	294
how such results 	294
 Access—	
of husband to wife during <i>Iddat</i>	133
 Accident—	
not affecting virginity of a woman 	33
 Account—	
of mesne profits of property held by wife in lieu of dower 	46
 Acknowledgment—	
of a woman as wife when proves the marriage 	88
as wife must be distinct and unmistakable 	89
of child of one's dead and disowned son valid 	189
of child of one's dead and disowned daughter invalid 	189
of paternity, filiation and fraternity 	194
of a child of unknown parentage as a son	195
of a Mahomedan child : effect of 	196
by father renders the son or daughter a legitimate child and heir ...	197
of a person as daughter means a legitimate daughter 	197
of a child as son gives the child status of a son 	197
doctrine of, not applicable when paternity of a child is known ...	198
when has the effect of legitimation 	198
by a woman, neither married nor observing <i>Iddat</i> , of a child of un- known parentage as son 	199
of a man of unknown parentage as brother 	200
of a child of known parentage not valid 	200
of a foundling as to its paternity 	202
of a debt during last illness in favour of a person not heir valid ...	290
of a debt in favour of an heir when void 	290

	<i>Page.</i>
Acknowledgment—<i>concl'd</i>	
of a debt in favour of a wife during last illness	291
of a debt by an heir due by the deceased is binding upon such heir	307
Acts—	
XLV of 1860 (Penal Code), Chap. XVI	117
s. 79	116
ss. 493, 494	80
VI of 1871 (Ben. Civil Courts)	323
s. 24	343, 325
of 1872 (Evidence), Chap. III	88
s. 2, cl. (1)	325
s. 501	198
ss. 59, 60	74
s. 108	322, 325, 326
s. 112	185, 190, 192, 193, 194
III of 1872 (Special Marriage)	77
IV of 1872 (Punjab Laws), s. 5	2
IX of 1872 (Contract), s. 11	4, 31, 314, 315
s. 12	314
ss. 13, 14	32
s. 18	87
s. 19	39, 86
s. 73	69
ss. 128, 140, 145	64
s. 186	35
s. 190	35
s. 196	36, 84, 86, 87
s. 197	87
s. 198	315
ss. 226, 227	36
III of 1873 (Mad. Civil Courts), s. 16	2
X of 1873 (Oaths)	186
s. 8	66
s. 12	66, 88
III of 1874 (Married Women's Property)	61
IX of 1875 (Majority), s. 2	5, 31, 318
s. 3	318
XX of 1875 (Central Provinces Laws), s. 5	2
I (B.C.) of 1876 (Registration of Muhammadan Marriages and Divorces)	2
XVIII of 1876 (Oudh Laws), s. 3	2
s. 5	48
XV of 1877 (Limitation)	111
Arts. 34, 35	122
Art. 103	44
Art. 104	45
XII of 1878 (Punjab Laws Amending), s. 1	2
II of 1879 (Central Provinces Laws), s. 3	301

<i>Acts—continued.</i>					<i>Page.</i>
V	of 1881 (Probate and Administration), Chap. VI, VII	...	...	...	301
	Chap. XIII	...	...	...	301, 313
	s. 3	...	...	...	301
	s. 4	...	...	...	293
	s. 90	...	...	...	303
	ss. 146, 147	...	...	...	311
IV	of 1882 (Transfer of Property), Chap. VII	...	...	...	242
	Chap. VIII	...	...	...	238
	s. 122	...	...	...	242
	s. 129	...	...	...	250
	s. 131	...	...	...	259
XIV	of 1882 (Civil Procedure), s. 11	...	...	...	122
	s. 111	...	...	...	113
	s. 260	...	...	...	122
XII	of 1887 (Bengal, N.-W. P. and Assam Civil Courts), s. 37	...	...	...	2
XI	of 1889 (Lower Burma Courts), s. 4	...	...	...	2
VI	of 1890 (Guardian and Wards), Chap. III	...	...	...	2, 232
	s. 7	...	...	...	319
	ss. 8, 24	...	...	...	210
V	of 1898 (Criminal Procedure), s. 488	...	...	...	12, 91, 95, 182, 188
	s. 489	...	...	...	100
VI	of 1900 (Lower Burma Courts)	...	...	...	2
statutes and, applicable to Mussalmans in India as to their personal law					
on marriages					2
Addition					
to dower					51
wife's right to, made to dower					52
Administrator—					
power of, to provide maintenance for relation of a missing person					321
Admission—					
of a debt by executor void					30
Adolescence—					
age of, how fixed					318
Affinity—					
marriage legally prohibited for reason of void					79
Age—					
at which custody of boy or girl ceases					216, 217
of reason and adolescence how fixed					218
of puberty how to be determined					318

	<i>Page.</i>
Agency—	
in marriage 	34—36
Agent—	
declaration by, where parties are legally competent ...	4
parties in marriage to appoint, when allowable ...	34
appointment of, for marriage how made ...	34
authority of, may be express or implied	35
delegation of authority by, to third party ...	35
obligation of, authorized by woman to give her in marriage ...	35
not responsible for dower unless guaranteed ...	35
contract of marriage by, when binds principal ...	35
remedy of, to realize guaranteed dower paid to the woman ...	35
enforcement and consequence of contract by ...	36
how far principal bound when, exceeds his authority ...	36
marriage contracted by, when valid ...	85
marriage by, when no woman mentioned... ...	85
marriage by, authorized to contract for one woman only but contracting for two by single contract 	85
marriage by, to two women by two successive contracts ...	85
marriage by, to a woman specified ...	85
dower settled by, when not so authorized ...	85, 86
contract of marriage by, authorized by women ...	86
liability of, for compensation in <i>Khula</i> repudiation ...	168
power of, appointed by a missing person... ...	320
Agreement—	
when parties to marriage may retract ...	3
written, not constituting a contract of marriage ...	3
written, only a mode of proving it ...	3
when maintenance fixed by mutual ...	184
when a hired wet-nurse may be compelled to renew her ...	207
between father and mother as to child's maintenance ...	226
Aieni—	
<i>See Bibliography.</i>	
Al Fatiha—	
reading of, not sufficient to constitute marriage ...	3
Alteration—	
in wife's maintenance 	100
Amount—	
rules regulating, of wife's maintenance ...	100—104
Apostasy—	
separation on account of 	172—174
where both the husband and wife are Muslims ...	172

	<i>Page.</i>
Apostasy—<i>concl.</i>	
judicial decree not necessary in separation for	172
legal effects of such separation... ..	172
separation for, only creates a provisional prohibition	172
where takes place after consummation of marriage	173
where precedes consummation of marriage	173
wife's right to dower and maintenance in such a case	173
wife's right to inheritance from husband where he dies before expiry of <i>Iddat</i>	273, 274
husband's right to inheritance from wife where she dies before expiry of her <i>Iddat</i>	274
when he cannot so inherit	274
Appendix—	
containing Arabic texts from the original works	329—474
Appointment—	
of agent for marriage how made	34
Arbitration—	
as to disputes between husband and wife	116
Assent—	
by an heir once given to a legacy is irrevocable	274
effect of, by heirs who are not legatees... ..	275
of heirs where not necessary	276
by heirs during testator's lifetime void	276
Aunt—	
marriage with, when not valid	18
Authority—	
marital	114—117
of husband in respect of wife's property	114
of husband to compel his wife to follow him on a journey	115
of husband to punish his wife in moderation for her fault	115, 116
where wife exceeds her, in the number of repudiations	149
of a person sheltering a foundling to use property found on its person for its maintenance	202
of a person sheltering a foundling to receive gifts and remuneration made in its favour	202
paternal	231—240
of father over his child	231, 232
extent of such	232
of father to deal with his child's property	232, 233
liability of a minor for acts of a person having no, to act as his guardian	235
of a <i>de facto</i> guardian to alienate minor's property for legal necessity and for his benefit	235

	<i>Page.</i>
Authority -- <i>concl'd.</i>	
of father to buy or sell property from or to his minor or incapable children	237
of father as guardian to deal with his child's goods by way of loan or security	237
of father to lend, borrow or make a gift of his minor child's property	238
of a poor father to sell his absent child's property to provide maintenance	239
Award —	
of maintenance of daughter-in-law against her father-in-law: competency of court in	225
B	
Bahr-ul-Rayek —	
See <i>Bibliography.</i>	
Bain repudiation —	
See <i>Repudiation.</i>	
Bait-ul-mal —	
or public treasury	203, 222, 284
Beauty —	
payment of dower where wife's, is stipulated for	59
Bengal Civil Courts Act —	
See <i>Acts.</i>	
Bequest —	
by a lunatic void	273
by a minor void	273
conditions of a valid	273
of a prodigal when valid	274
of testator's whole property to a single person when valid	274
by a person in debt when valid	275
in favour of an heir when valid	275
exceeding one-third of testator's property when valid	276
limit of property to be given by	276
of less than one-third of property	277
when husband and wife can make, to each other	278, 279
in favour of some to the exclusion of other heirs without latter's consent	279
in favour of a person causing death of testator	279
in favour of a child in the womb	279
validity and employment of charitable	280
difference of religion not affecting a	281
time for accepting a	281
revocation of a, how made	282
denial of a, not constituting revocation	282

	<i>Page.</i>
Bequest—<i>concl.</i>	
liability of testator for loss of object of, while in his possession	... 282
right of testator having heirs to a	... 282
consent of heirs regarding a, to a stranger	... 283
of one-third property to two persons one of whom dead or missing	... 284
of a specified sum while there is a debt against the estate	... 285
of use and produce of property to a limited period	286—288
of right of residence in or rents of a house	... 286
of use and produce of immovable property	... 286
of usufruct to one and property to other person	... 288
of one-third of property valid	... 289
in favour of wife during last illness	... 291

Bibliography—

of works in the original Arabic	... lv
---------------------------------	--------

Birth—

or identity of child how proved	... 194
where a married woman claims to have given, to a child	... 194
proof of child's	194—201
child illegitimate by, how becomes legitimate	196, 198

Burden of proof—

where depositary or debtor provided maintenance	... 109
as to marriage where there is a clear and open declaration of paternity	196

C**Care—**

right of, and custody of girl-wife belongs to her mother	... 33
right of, and custody of girl-wife belongs not to her husband	... 33

Cases—

table of, cited	... xli
-----------------	---------

Central Provinces Laws Act—

See Acts.

Ceremony—

neither writing nor religious, necessary to contract a valid marriage	... 5
---	-------

Charitable bequest—

See Bequest.

Charitable gift—

See Gifts.

Child—

given in marriage when can ratify or repudiate it	... 5
compulsory power of father and grandfather to give, in marriage	... 26
religion of, born of marriage between a Muslim and a Christian woman	
or a Jewess	... 75

	<i>Page.</i>
Child—<i>contd.</i>	
to follow father's religion	75
religion of, when husband or wife embraces <i>Islam</i>	78
fatherless minor, not bound to embrace <i>Islam</i>	78
legitimacy of, born of void marriage	83
liability of wife as to suckle and maintain, in <i>Khula</i> repudiation ...	163
when wife may keep her, born of dissolved marriage	164
right of husband and wife as to custody of	164, 165
maintenance of, in <i>Khula</i> repudiation	165
paternity of, where born in full months from date of valid marriage ...	185
paternity of, where husband denies its legitimacy	186
when a husband can disown a	187
cases where a, cannot be held illegitimate	188
legal status of illegitimate	188
acknowledgment of, of one's dead and disowned son	189
acknowledgment of, of one's dead and disowned daughter	189
paternity of, born to a young widow	193
paternity of, where wife claims to be pregnant when repudiated ...	193
birth or identity of, how proved	194
paternity of, born within two years since repudiation or husband's death	194
where a married woman claims to have given birth to a	194
proof of birth of	194—201
acknowledgment of a, of unknown parentage as son	195
right of, acknowledged as son to maintenance, &c.	195
an antenuptial, illegitimate	196
born out of wedlock illegitimate	196
illegitimate by birth how becomes legitimate	196
effect of acknowledgment of a Mahomedan	196
acknowledgment by father renders the son or daughter a legitimate, and heir	197
acknowledgment of a, when valid	197
presumption as to legitimation of a, how made	197
doctrine of acknowledgment applicable where paternity of a, is known...	198
acknowledgment by a woman neither married nor observing <i>Iddat</i> of a, of unknown parentage as son	199
right and liabilities of a, acknowledging a man as father and a woman as mother	199
of known parentage cannot be validly acknowledged	200
cases where a mother is bound to suckle her, herself	204
duties of parents towards their	204
liability of father to provide a wet-nurse for suckling of	205
where mother entitled to remuneration for suckling her	205
remuneration where mother engaged to suckle her	206
right of mother to custody of her	210
wife's right to remove, entrusted to her custody during and after <i>Iddat</i> ...	219
father's duties towards his	220
right of custodian to remove, without father's consent	220
maintenance of parent by	226—229

	<i>Page.</i>
Child — <i>concl.</i>	
when can rescind contract made by its father ...	236
when can cancel sale made by its father ...	236
bequest in favour of, in womb ...	279
custody of—See <i>Custody</i> .	
maintenance of—See <i>Maintenance</i> .	
maintenance of parents by—See <i>Maintenance</i> .	
paternity of—See <i>Paternity</i> .	
See also under <i>Foundling</i> .	
Christian (s) —	
contract of marriage by a woman of Shiah sect with a, not valid ...	20
foundling when discovered in a quarter exclusively inhabited by Jews or ...	201
Christian Woman —	
marriage of Muslim with, when lawful ...	20, 74
witness necessary in such marriage ...	74
evidence where, denies the marriage ...	74
right of Muslim already married to a Muslim woman to marry a ...	74
how to be treated when there is a Muslim co-wife ...	74
validity of marriage where a, married to a Muslim husband becomes a Jewess ...	75
religion of children born of marriage between a Muslim and a ...	75
dissolution of marriage where husband of a, turns Muslim ...	77
power of judge to dissolve marriage contracted by a, while observing <i>Iddat</i> ...	78
Civil Courts Acts —	
See <i>Acts</i> .	
Civil Procedure Code —	
See <i>Acts</i> .	
Claim —	
where two persons lay, to a foundling ...	203
Clothing —	
quality of, how determined ...	104
price of, how and when payable ...	104
where wife can claim a new ...	104, 105
and lodging of wife ...	104—107
Cohabitation —	
effect of marriage cancelled before, or any equivalent act ...	14
as husband and wife is evidence of marriage ...	14
with wife when can be enforced ...	118
right of wife to refuse further ...	118, 119
Companion —	
where husband bound to provide a, for his wife ...	106

	<i>Page.</i>
Compensation—	
repudiation with, irrevocable	138
amount of, necessary in <i>Khula</i> repudiation	160
fit subjects for, in <i>Khula</i> repudiation	160
<i>Khula</i> repudiation with or without, when equivalent to irrevocable repudiation	160
proposal of <i>Khula</i> repudiation in consideration of	160
effects of <i>Khula</i> repudiation with	161
effects of <i>Khula</i> repudiation without	162
where dower is, for <i>Khula</i> repudiation	162
liability of wife where articles of, perish before delivery	163
in <i>Khula</i> repudiation in respect of minor	165, 166
in <i>Khula</i> repudiation when payable	168
in <i>Khula</i> repudiation where marriage void	168
liability of agent for, in <i>Khula</i> repudiation	168
Conditions—	
requisite for a valid marriage	4-14
Conditional repudiation—	
See <i>Repudiation</i> .	
Conjugal rights—	
when an action for restitution of, may lie... ..	116
suit for restitution of, when not maintainable	119
in a suit for restitution of, where defence being non-payment of exigible dower	121, 122
question of jurisdiction in a suit for restitution of	122
limitation in suit for restitution of	122
Consanguinity—	
marriage legally prohibited for reason of, void	79
Consent—	
to a marriage essential to bind the party	5
of mother in marriage sufficient in case of apostasy of father	23
of adult woman essential in marriage	31
of virgin as to her marriage how expressed	32
of adult woman how expressed	32
silence does not amount to, in adult woman	32
validity of marriage contracted by invalids without guardian's	84
repudiation by mutual, of husband and wife in <i>Khula</i> form	158
right of custodian to remove child without father's	220
Consumptive—	
gift by, valid	289
Continence—	
when a vow of, effects an irrevocable repudiation	139

Contract—*Page.*

of marriage with widow when not lawful	...	...	...	2
written agreement not constituting a, of marriage but only a mode of proving it	...	...	...	3
marriage is a civil	...	...	...	5
acceptance not to vary from declaration in, of marriage	...	...	...	6
qualification of witness present in, of marriage	...	...	...	6
of marriage when both parties Mussalmans	...	...	...	7
of marriage before witness asleep or intoxicated not valid	...	...	...	7
when written, necessary in marriage and when not	...	...	...	8
no reservation of option of seeing each other or imposition of any other condition in, for marriage	...	...	...	10
for marriage with stipulation for beauty or virginity in woman and for total absence of malady or infirmity in man: contract valid and stipulation void	...	...	...	11
of marriage between Mahomedan woman and non-Mussalman	...	...	...	16
of marriage by a woman of Shiah sect with a Christian not valid	...	...	...	20
validity of marriage-, by next nearest relation the nearer relation being absent	...	...	...	24
of marriage where there are two relations of the same degree	...	...	...	25
right of ward compelled in marriage to cancel, at puberty	...	...	...	28
of marriage by agent when binds principal	...	...	...	35
enforcement and consequence of, by agent	...	...	...	36
question for marriage to be considered when, made	...	...	...	36
proof of verbal, as to large amount of dower allowable	...	...	...	41
valid where unlawful things settled as dower	...	...	...	42
simple, of money payment for dower not necessarily giving right to wife over husband's property	...	...	...	45
valid, of marriage gives wife right to her dower	...	...	...	45
marriage with two sisters under one, when void	...	...	...	80
separate, by separate guardian for marriage of the same ward: validity of	...	...	...	83
of marriage by agent when binding on his principal	...	...	...	85, 86
of marriage by agent authorized by woman	...	...	...	86
by wife when valid	...	...	...	114
what a Mahomedan matrimonial, involves	...	...	...	121
remuneration for suckling equivalent to a, for hire	...	...	...	206
when a child can rescind, made by its father	...	...	...	236

Contract Act—*See Acts.***Cost -**

in regard to custody of a child	...	215
---------------------------------	-----	-----

Criminal Procedure Code—*See Acts.*

	<i>Page.</i>
Crippled—	
maintenance of, persons	228
gift by, persons valid	289
Crops—	
right of legatee to standing, of land bequeathed	287
Custody—	
right of care and, of girl-wife belongs to her mother and not to her husband	33
right of husband to recover his child-wife from, of her mother	34
right of husband and wife as to, of child	164, 165
of child, right of mother to the	210, 211
— when mother forfeits the right of	211
— right of repudiated wife to the	210
— right of guardian to the	210
— where change of religion apprehended	211
qualification necessary to exercise right of, in respect of child	211
right of, in respect of child how forfeited	211
mother's right of, in respect of child on marrying a stranger	212
of a girl, an issue of a Christian marriage	212
discretionary power of court regarding, of child discussed	212
right of divorced mother regarding, of her daughter	212
right of guardian against mother as to, of illegitimate child	212
preferential right of mother to, of her married infant daughter	213
persons entitled to, of child in default of mother	213
woman preferred to man in, of child	213
of child where there are no male paternal or <i>asab</i> relations	214, 215
where a woman refuses to take, of child	215
costs in regard to, of a child	215
where mother not entitled to remuneration for, of her child	216
of child where both father and child without means	216
age at which, of boy or girl ceases	216, 217
where mother is proper person to take, of child	217, 218
bad character and manner of life disqualify a woman to take, of her minor sister	218
of minor wife belongs to her mother notwithstanding contract against it	218
wife's right to remove child entrusted to her, during and after <i>Iddat</i>	219
Custodian—	
right of, in respect of child	219
right of, to remove child without father's consent	220
Custom—	
in considering equality serves as a guide	39
reference to, necessary only in case of prompt dower	42

Custom— <i>concord</i>	Page.
where, fails reference to be made to status of woman as to amount of fixed dower	45
as to payment of dower	65
local, to serve as guide where there is a dispute as to marriage-outfit . .	72

D

Darul Islam—	
what is signified by	78

Daughter—

given in marriage by father cannot annul marriage on coming of age . .	7
witness necessary when a father gives his adult, in marriage . . .	7
witness necessary when a father present at the marriage of his minor . .	5
marriage with, or mother of a wife when forbidden	17
power of father to remit dower settled on his	52
liability of father for maintenance of his adult unmarried	

Deaf man—

cannot act as a witness to marriage	7
---	---

Death—

wife's right to inheritance in case of husband's, while observing <i>Iddat</i> . .	155
of wife during <i>Iddat</i> entitles husband to his share in her estate . . .	158
paternity of child born within two years since repudiation or husband's	194
remuneration for suckling not lost by father's	207

Death-bed gift—

See *Gift (s)*.

Debt (s)—

widow's claim for unpaid dower is a, payable <i>pari passu</i> with other debts	47
for maintenance	110
maintenance payable before	110
maintenance where treated as a	110
for maintenance where not subject to law of limitation	111
maintenance judicially decreed remains a, against husband . . .	112
<i>Khula</i> repudiation cancels all, arising from dissolved marriage . . .	161
suit for, in <i>Khula</i> repudiation	162
appropriation of wife's, towards amount of child's maintenance . . .	165
limitation as to, for maintenance decreed by judge	226
for maintenance when extinguished	231
bequest by a person in, when valid	275
against estate of testator while he bequeaths a specified sum . . .	285
acknowledgment of a, during last illness in favour of a person not heir ,	290

	<i>Page.</i>
Debt (s)—<i>concl'd.</i>	
acknowledgment of a, in favour of an heir void	290
acknowledgment of a, in favour of wife during last illness	291
release of a, in last illness when void	291
when takes precedence over a legacy	292
that cannot be validly paid during last illness	292
executor's power as to, due to the estate	306, 307
admission of a, by executor void	307
acknowledgment of a, by an heir due by the deceased is binding upon such heir	307
executor's responsibility for paying, against deceased's estate...	308
Declaration—	
and acceptance essential in a valid marriage	4
for marriage by whom may be made	4
by agents where parties are legally competent	4
by guardians when contracting parties are minor or legally in- competent	4
acceptance not to vary from, in contract of marriage	4
and acceptance of marriage where both contracting parties present ...	6
on oath for settlement of dower	66, 67
in case of dispute as to intention with which sums or movable effects advanced	69, 70
effect of wife's, regarding repudiation	147
of executor on oath sufficient as to his acts	309
when such, is not sufficient	310
of executor as to his expenditure when may be accepted	310
Decree—	
dower fixed after marriage by judicial	51
for recovery of wives	122
for restitution of conjugal rights	122
necessity of a judicial, in <i>Khula</i> repudiation	160
Deduction—	
to dower when to be made	68
Deed—	
of settlement covering property not in possession of settlor	42
of gift. See <i>Gift (s)</i> .	
Deferred—	
division of dower as prompt and	42
limitation regarding suit for, dower	45
revocable repudiation renders payable the, part of dower still due from husband	136

Deferred dower—*Page.*See *Dower*.**Dispute—**

settlement of, between husband and father of child-wife as to wife's

condition ... 33

arbitration as to, between husband and wife ... 116

as to the expiration of *Iddat* ... 135

as to fitness for management when minor attains majority ... 312, 313

Dissolution of Marriage—

where judge to pronounce ... 76—79

See *Marriage*.**Divorces (Talak)**

124—158

Donatio Mortis Causa—

is void and of no effect ... 250

not effectual as gift ... 251

Donee—right of, as to gift. See *Gift (s)*.**Donor**right of, in gift. See *Gift (s)*.**Dower—**

marriage without settlement of, valid ... 8

fixation of, before marriage not necessary in Mahomedan Law ... 9

widow's possession of property in lieu of, for marriage ... 9

right of widow to claim the balance of, for marriage ... 9

right of father to demand and receive prompt part of, on behalf of child-wife ... 33

agent not responsible for, unless guaranteed ... 35

remedy of agent to realize guaranteed, paid to the woman ... 39

limit as to amount of ... 40

Shiah and Sunni doctrine as to amount of ... 40

Mahomedan law as to limit of ... 40

law regulating ... 40—73

time for fixing the amount of ... 41

where stipulated as excessive with reference to husband's means ... 41

cause of stipulating high ... 41

proof of verbal contract as to large amount of, allowable ... 41

of what it may consist ... 41

may be divided as prompt and deferred ... 42

property given to a wife as, no portion can without her permission be

given to another wife ... 42

	<i>Page.</i>
Dower—<i>contd.</i>	
where property given to wife in her, without being specified ...	42
settlement void and contract valid where unlawful things settled as ...	42
things that cannot be subject of	42
where property cannot be made subject of	42
when a, to be considered as prompt	43
when payable on demand	43
exigible, when claimable	43
reference to custom necessary only in case of prompt	43
status of woman for determining	43
principle as to payment of	43
where no specific amount of, declared exigible	43
when deferred, can be demanded	44
presumption as to	44
wife's lien on her husband's estate in lieu of	44
lien of Mahomedan widow for balance of... ..	44
retention of possession until, satisfied	44
limitation for suit to realize prompt	44
priority of widow's claim on her husband's property in lieu of ...	44
time when wife's right to, is acquired	45
retention of possession until, paid	45
limitation for suit to realize deferred	45
right of wife over	45
wife's claim to full amount of, discussed	45
simple contract of money payment for, not necessarily giving right to wife over husband's property	45
suit by widow against estate of her late husband to realize	46
lien for, is a personal right	46
validity of gift of immovable property in lieu of	46
right of widow to, is personal and does not pass to purchaser of estate	46
account as to mesne profits of property held by wife in lieu of ...	46
widow's right to take possession of her husband's real estate in lieu of ...	47
widow's right to sell property in possession in lieu of	47
widow's claim for unpaid	47
marriage presents not to be counted in lieu of	47
widow's possession in lieu of	47
Punjab Code as to payment of	47
claim for, is not as high as a mortgage	48
obligation of husband to pay full amount of	48
excess of, though improper not prohibited by law	48
amount of, how recoverable	48
cases where wife entitled to proper	49
position and dignity of bride regulates	49
wife's proper, how to be determined	49
witness for determination of proper	50
sworn declaration of husband for determination of, when necessary ...	50
woman married without, entitled to proper dower	50

Dower—*contd.*

Page.

right of widow to, where there is no deed to that effect ...	51
obligation of husband for, fixed after marriage by mutual agreement or by judicial decree	51
additions to	51
evidence to support claim for	51
power of father to remit, settled on his daughter	51
power of adult wife to remit, in her husband's favour	52
right of wife to remit her claim to	52
waiver of widow's claim to	52
cases where full, is due and payable	52
wife's right to addition made to	52
wife's right over whole, once perfected never forfeited	53
right of wife to, and its increase where repudiated before consum- mation of marriage	54
right of wife to dispose of	54
where only half the, claimable of the husband	55
where wife entitled to stipulated	55
where wife in lieu of, entitled to <i>Mutah</i>	56
where wife neither entitled to, nor <i>Mutah</i>	57
payment of, where wife's virginity is stipulated for	59
payment of, where wife's beauty is stipulated for	59
where husband is bound to pay stipulated or proper	60
persons who may receive, for or on behalf of a minor	60
power of executor to realize	60, 61
is wife's sole property	61
right of husband in case of gift of, by wife	61
wife not to be compelled to relinquish her	62
suit for, by heir of widow	62
right of widow to demand her, from husband's heirs	63
suretyship in	63
loss and consummation of	63
wife's claim to	63
where guardian may stand surety for	63
where father liable for, in respect of minor	64
where wife cannot claim, either from husband or surety	65
custom as to payment of	65
wife's claim in respect of, which is lost	65
disputes relating to	65—73
wife's claim to prompt, after her surrender to her husband	65
judge how to decide a dispute as to	66
dispute as to, if arises after repudiation but before consummation	66
basis of settlement in case of dispute as to amount of	66
when <i>Mutah</i> due instead of	66
declaration on oath for settlement of	66, 67
procedure as to settlement of, where both parties dead	67
when proper, in full to be paid to wife	67

	<i>Page.</i>
Dower—concl'd.	
deduction to, when to be made	68
return of gift of, advanced with a view to marriage	69
purchase of marriage outfit from	71
in marriage of two sisters if cancelled before or after consummation of marriage	81
where one of two sisters establishes priority of her marriage	81
marriage contracted without, being settled	81
settled by agent when not so authorized	85, 86
cancellation of marriage unless difference of, made good	86
in <i>Khula</i> repudiation	161, 162
where a compensation for <i>Khula</i> repudiation	162
in <i>Khula</i> repudiation in respect of minor	165, 166
right of wife to, when apostasy takes place before consummation of marriage	173
where marriage dissolved on the ground of fosterage	209
gift in lieu of—See <i>Gift</i> .	

Durrul-Mukhtar—See *Bibliography***Duties—**

of husband towards wife—

as to maintenance	91—94
„ cohabitation	91
„ equality of treatment where several wives	92, 93
„ obligations of such equality	92
„ partitioning his nights	92
„ whether such partition necessary when on a journey	93
„ when he is ill	93, 94
„ treatment	95—113
of wife towards her husband after payment of prompt dower	117
of parents towards their children	204—226
of father towards his child	220
of children towards their parents	226—229
of executor	293—313

Dwelling—

where husband bound to provide his wife with another	105
--	-----

E**Effect—**

of ratification	36
of conditional repudiation	145
of suspended repudiation when ceases	145
of husband's oath as to repudiation when ceases	146
of wife's declaration regarding repudiation	147
of irrevocable repudiation during husband's illness	155
of <i>Khula</i> repudiation with compensation	161

Effect— <i>concltd.</i>	<i>Page.</i>
of <i>Khula</i> repudiation without compensation	162
of <i>Khula</i> repudiation offered by wife during last illness	167
of separation for impotency	171
of separation consequent upon oath of <i>lian</i>	189
produced on acknowledgment of a child as son	195
of acknowledgment of a Mahomedan child	196
when acknowledgment has the, of legitimation	198
of sucking regarding prohibition to marriage	208
Employment—	
right of father to set his minor son to	225
Equality—	
in marriage	36—39
Evidence—	
cohabitation as husband and wife is, of marriage	14
to support claim for dower	51
of witnesses being descendants of parties not admissible	88
of guardian against his ward where marriage denied	88
as to birth or identity of child	194
Evidence Act—	
See <i>Acts.</i>	
Ewaz—	
or compensation	267
Exchange—	
marriage by, valid	10
definition of marriage by	10
Executor (s)—	
exclusion of, from guardianship in marriage of wards	23
powers and duties of	293—313
obligation of, when accepting his office during testator's lifetime	293
definition of	293
refusal to become, when valid	293
after refusal when cannot accept office	294
where neither accepting nor refusing office before testator's death	294
testator cannot restrict functions of	295
who may be appointed as	295
appointed by father takes precedence over paternal grandfather	295
qualifications necessary for an	296
where a Mahomedan appointed a Hindu as	296
appointment of an infidel, does not invalidate a will	296
when cannot be removed	297
when a judge can appoint an	297
cases where joint, can act independently of each other	298

	<i>Page.</i>
Executor (s) —<i>concl'd.</i>	
where two, appointed and only one accepts	298, 299
where executor appoints an, in his turn ... ..	.. 299
competency of, to appoint a successor ... ..	... 299
cases where, can dispose of minor's property	299, 300
when can sell portions of deceased testator's estate ... ..	... 301
limit of power of, of a Cutchi Memon ... ..	... 301
when can dispose of testator's property without heirs' consent	301, 302
when can dispose of share of minor heirs ... ..	... 302
power of, appointed by father when the estate is incumbered ...	302, 303
power of, appointed by grandfather as to disposal of estate to pay debts or legacies ... ..	... 303
power of, appointed by mother	303, 304
power of, as regards application of minor's property ... ..	... 304
power of, as regards sale of minor's property	304, 305
when can allow reasonable time to buyer for payment ... ..	... 305
when can sell his own property to minor and purchase minor's property	305
power of, as regards giving or lending minor's property ... ..	... 306
can delegate his power to another ... ..	... 306
cannot release a debtor from a debt due to estate ... ..	... 306
circumstance where, can compound a debt due to estate ... ..	... 307
admission of a debt by, void ... ..	... 307
must provide reasonable maintenance for his ward ... ..	... 307
where advances ward's maintenance from his own fund ... ..	... 308
responsibility of, for paying debt against deceased's estate ... ..	... 308
when can, claim salary .. ...	... 309
demand of account by minor from ... ..	... 309
minor's claim against estate of deceased ... ..	... 309
sworn declaration of, sufficient as to his acts ... ..	... 309
when such declaration not sufficient ... ..	... 310
false statement of, must be rejected ... ..	... 310
declaration of, as to his expenditure when may be accepted ... ..	... 310
when can deliver property to ward ... ..	... 311
when can interfere with administration of his ward though adult at the time... ..	... 311
responsibility of, for delivering property to his minor on his attaining majority ... ..	... 312

Exigible Dower—See *Dower*.**Expenditure—**

declaration of executor as to his, when may be accepted	310
--	-----

F**Fatawa-i-Alamgiri—**See *Bibliography*

Fatawa-i-Kazi Khan -*See Bibliography.***Fatawa-i-Khairiah -***See Bibliography.***Fatawa-i-Serajiah -***See Bibliography.***Fath-ul-Kadir -***See Bibliography.***Father -**

compulsory power of, to give children in marriage ...	26
validity of marriage under compulsory power of, or grandfather	26
validity of marriage contracted by, a reputed profligate ...	27
right of, to demand and receive prompt part of dower on behalf of child-wife ...	33
power of, to remit dower settled on his daughter ...	52
power of, as guardian to dispose of property of his minor sons ...	64
where liable for dower in respect of minor ...	64
right and liability of, in respect of minor in <i>Khula</i> repudiation	165, 166, 167
where bound to provide a wet-nurse to suckle a child ...	205
duties of, towards his child ...	220
when must provide maintenance for his adult son ...	221
liability of, for maintenance of his adult unmarried daughter ...	221
not liable to maintain his minor son's wife ...	224
maintenance of, when ill, infirm and unable to take care of himself ...	227
authority of, over his children ...	231, 232
extent of his such authority ...	232
how to deal with his children's property ...	232, 233
power of, as guardian of his child ...	233
right of, to sell and purchase property for his child ...	237
right of, as guardian to deal with his child's goods and property	237, 238
assignment of debt of minor child by ...	238
when cannot claim for value of articles supplied to his minor child	238
child's claim to property specified before death of its	239
suit against, for recovery of property ...	239
when can sell property of his absent child ...	239
guardianship after death of, on whom devolves	239, 240

Fazoollee Marriage -*See Marriages.***Filiation -**

acknowledgment of ...	194-201
-----------------------	---------

Fire-worshippers -

marriage of Muslim with, unlawful ...	20
---------------------------------------	----

Foreign language.—

party contracting marriage should hear each other's words even when uttered in	6
--	-----	-----	-----	-----	-----	-----	---

Fosterage —

an impediment to marriage	...	...	...	...	17, 207
marriage legally prohibited for reason of, void	...	...	...	...	79
persons affected by	...	...	...	...	208
as impediments where one of the two wives suckles the other	...	...	...	...	209
how proved	...	...	...	...	209
dower, maintenance and lodging how affected on proof of	...	...	...	...	209, 210

Foundling (s)—

duty towards	...	...	...	...	...	201
when held to be a Muslim	...	...	...	...	...	201
right of persons over	...	...	...	...	...	201
when discovered in a quarter exclusively inhabited by Jews or Christians	...	...	...	...	...	201
property found on the person of	...	...	...	...	...	202
responsibilities of a person sheltering a	...	...	...	...	...	202
acknowledgment of a, as to paternity	...	...	...	...	...	202
where two persons lay claim to a	...	...	...	...	...	203
where a married woman acknowledges a, as her son	...	...	...	...	...	203
maintenance where a, is destitute and acknowledged by no body	...	...	...	...	...	203

Fraternity—

acknowledgment of	194—201
-------------------	-----	-----	-----	-----	-----	---------

G**Gestation—**

recognised period of	185
----------------------	-----	-----	-----	-----	-----	-----

Gift (s)—

validity of, of immovable property in lieu of whole dower	...	...	...	...	...	46
right of husband with regard to, of dower by wife	...	...	...	...	...	61
return of, or dower advanced with a view to marriage	...	...	...	...	...	69
<i>inter vivos</i>	...	...	...	...	...	241—271
requisite conditions for validity of	...	...	...	...	...	241—252
what completes a	...	...	...	...	...	241
what it signifies	...	...	...	...	...	241, 242
by a Mahomedan lady in favour of adopted minor son valid	...	...	...	...	...	242
where deed of, not in form of <i>hibanamah</i> , but property delivered valid	...	...	...	...	...	242
objection of indefiniteness against a deed of, not maintainable	...	...	...	...	...	242
in favour of wife valid: property being in possession of husband	...	...	...	...	...	242
deed of, in favour of adopted son possession not being delivered	...	...	...	...	...	242
inoperative	...	...	...	...	...	242

Gift (s)—contd.*Page.*

deed of, in favour of wife with conditions limiting her power over property void	243
by a Mahomedan lady in favour of her children valid	243
not to depend upon contingency or be postponed	243
right of widow to give away her property by law as to	243
of property not in actual possession invalid	243, 249
instrument of, making grantees owners of grantor's shares	244
on stipulation: requirements of	244
seizin necessary and absolutely indispensable in a	244
must not be implied	244
handing over of deposit-notes to wife incomplete as a	244
qualifications necessary in donor for validity of	245
on death-bed not legal	245
deed of, made when suffering from last and fatal illness	245
extent of valid, that can be made on fatal illness	245
person afflicted with <i>marz-ul-maut</i> incompetent to make a	245
law of, not applicable when made in lieu of dower-debt	246
by a person suffering more than a year but in possession of senses	246
by a person suffering from death-illness has only a qualified effect	246
in death-bed valid where heirs assent	246
questions for consideration as to doctrine applicable to <i>marz-ul-maut</i>	246
conditions necessary in a complete and valid	247
where subject-matter of, not transferred to donee during donor's life-time	248
not accompanied by possession invalid	248
of an undivided share in property invalid	249
indefinite and <i>in futuro</i>	249, 252
where possession transferred by donor to donee valid	249
subject of, should be in actual or constructive possession of donor	249
mere mention of, in a petition to court not sufficient	249
proof necessary in a valid	250
persons to whom a, may be made	250
of what a, may consist	250
consideration in a, where undefined and unknown the deed is inoperative	250
of whole property where made in favour of only one donee specification not requisite	251
<i>donatio mortis causa</i> not effectual as a	251
of property not to take effect till donor's death void	251
made in contemplation of death operates as a legacy	251
deed of, not defining interest of such donee bad	251
instance of <i>hiba-bil-uwaz</i> or, for consideration	251
of undivided share in property transfers ownership	252
maxim to render a, valid	252
vitiated by confusion	252

	<i>Page.</i>
Gift (s)—<i>contd.</i>	
Shia school as to, of undivided property	253
for a consideration and on condition of a return how vitiated ...	253
of part of a thing capable of division	253
where object of, is an undivided moiety of a house	253
when donee was authorised to take possession	253
possession taken under invalid, of <i>musha</i> transfers the property ...	254
validity of a, not a question regarding succession, &c.	254
how ownership transferred in a, of undivided share of divisible pro-	
perty	254
what is necessary to render a, valid... ..	255
of undivided share of property under mortgage	255
of divisible property should be divided at the time of gift	255
of definite shares in Zemindari	255, 256
change of possession sufficient to support	255
change of possession (where possible) necessary to make a, perfect ...	255
where donor's interest separate	256
of property where joined to other property of donor	256
necessary conditions of a	257
of divisible property to different persons	257
of what has no separate existence	257
of undivided share in property when valid	258
of debt to debtor by creditor	258
of debt to a person other than debtor void	258
persons capable of receiving a	259—262
to a minor by his executor or guardian when complete	259
possession of, where donor is father, mother or any other person having	
authority over minor	259
possession of, where it is composed of divisible property	259
to an adult when valid	259
by father to his minor son valid although possession not delivered ..	259
formal delivery and seizin of, when not necessary... ..	260
rule as to, between strangers	260
deed of, by a lady in favour of a fiduciary relation not valid... ..	260
intention and not actual change of possession necessary in, by a father	
to his minor son	260
in favour of son with reservation valid	260
but invalid where donee does not become exclusive owner of gifted pro-	
perty	260
suit to cancel a deed of, on the ground of not delivering possession ...	260
relinquishment of share in favour of a minor not only a, but transfer	
of property	261
who can take possession of a, in favour of minor by a stranger	261
by a father to a son complete without delivery of property	261
husband's receiving a, made in favour of his minor wife valid	262
revocation of	262—271
where donor can revoke a	262

Gift (s)—<i>concl.</i>	<i>Page.</i>
revocation where there is increase in, itself	262
revocation where increase not united to	262
bar to revocation where one of the parties to, died after delivery of possession	263
right of revocation of, when forfeited	263, 266
by husband to wife and <i>vice versa</i>	264
<i>hiba-bil-uwaz</i> to wife with possession not to defraud creditors valid	264
necessary requirements to make a, in lieu of dower valid	264
acts essential for giving validity to a	265
irrevocable	266
by way of remission of rent when complete	266
right of revocation of, when forfeited...	266
cannot be revoked where made with compensation	267
of property in consideration of ornament amount to sale	267
revocation of, without consideration valid	267
for consideration is in effect a sale and purchase	267
for consideration in contemplation of marriage valid	268
for consideration different from out-and-out sale and gift	268
for consideration: fundamental conception of	268
indispensable condition for validity of a	268
revocation where donor is deprived of compensation in respect of compensation where, perishes in donee's possession and donor demands the return of the same	269
right of father to pay compensation out of his minor child's property...	269
revocation of, in favour of poor man	269
revocation of, how effected	269, 270
subject to compensation when complete	270
when open to revocation	270
conditions requisite in charitable	271
of a fund for disposal in charity at executor's discretion valid	271
on death-bed and transaction by the sick	288-293
unconditional, how far valid	288, 289
by cripple, paralytic or a consumptive person	289
Girl (s)—	
union with a free woman after marrying four slave, is not the fifth marriage	19
on attaining puberty a, is emancipated from all guardianship	22
presumption as to puberty of	28
care and custody of a, wife	33
custody of a, an issue of a Christian marriage	212
sale of property by <i>de facto</i> guardian of a minor, how far binding on her	235
how long a, must be placed under guardianship	319, 320
Grandfather—	
compulsory power of, to give children in marriage	26
validity of marriage under compulsory power of father or	26
validity of marriage contracted by, a reputed profligate	27

	<i>Page.</i>
Guardian (s)–	
declaration by, when contracting parties are minor or legally incompetent	4
necessary qualifications of, in marriage	21
where intervention of, in marriage an essential condition to its validity ...	21
who may be the, of minor and invalid adult in marriage	22
exclusion of executor as, in marriage	23
of wards	23
guardianship in marriage when nearer, in jail	23
Muslim cannot act as, in the marriage of non-Muslim	24
——— nor in the administration of his property	24
non-Muslim can act as, in the marriage of non-Muslim	24
——— also in the administration of property	24
compulsory power of, to give children in marriage	26
marriage contracted by, to an unsuitable person	27
right of ward to demand dissolution of marriage contracted by ...	27
marriage without intervention of, when valid and binding	30, 31
power of, to cancel or ratify marriage	39
where may stand surety for dower	63
separate contract by separate, for marriage of the same ward : validity of	83
marriage of, with his adult ward when void	83
ratification of, when necessary in marriage	84
validity of marriage contracted by invalids without consent of ...	84
testimony of, against his ward where marriage denied	88
rights, liabilities and duties of... ..	232
sale of landed property of child by, permissible	233
power of <i>de facto</i>	234
uncle as, of minor's property	234
when may sell his ward's property	234
when mortgagor not the, of infant's property : effect of mortgage ..	234
power of, to sell minor's immovable property	234
mother not the, of her minor child	235
sale of property by <i>de facto</i>	235
when a judge can appoint another, in place of father	236
when can authorize a minor to trade	317

Guardian and Wards Act—

See Acts.

Guardianship—

in marriage	21, 34
order of, for minor and invalid adult in marriage	22
failing <i>asab</i> relations	22
failing any relations	23
of ruling authority in marriage	23
in marriage when nearer guardian in jail	23
in marriage in case of apostasy of father	23

	<i>Page.</i>
Guardianship—<i>contd.</i>	
after father's death on whom devolves	239, 240
for wards when ceases... ..	319
how long a girl must be placed under	319, 320
H	
Hajr—	
definition of	313
See <i>Inhibition.</i>	
Hamavi—	
See <i>Bibliography.</i>	
Hazanah	
or custody of child	164, 200, 210
See <i>Custody.</i>	
Heir—	
how to determine whether a person is an	275
acknowledgment of a debt in favour of an, void	290
status of an, how determined	290
acknowledgment of a debt by an, due by the deceased is binding upon such	
heir	307
Hiba--	
See <i>Will (s).</i>	
Hiba-bil-ewaz--	
or gift for consideration : seizin of donee necessary in	247
Hidayah—	
See <i>Bibliography.</i>	
Household effects—	
ownership of, how settled	73
Husband—	
liabilities of, and wife by establishment of marriage	11, 12
cohabitation as, and wife is evidence of marriage	14
marriage of a Mahomedan woman to a second, during first husband's	
lifetime	16
settlement of dispute between, and the child-wife as to her condition	31
right of care and custody belongs not to her	33
right of, to recover his child-wife from her mother's custody	34
obligation of, for dower fixed after marriage by mutual agreement or	
by judicial decree	51
obligation of, to discharge addition to dower	51
power of adult wife to remit dower in favour of	52
right of, in case of gift of dower by wife	61
penalty of, contracting illegal marriage	79, 80
his treatment of wife	91
his equality of treatment in case of several wives	92

	<i>Page.</i>
Husband—contd.	
such equality of treatment obligatory on, under all circumstances ...	92
must partition his nights equally among his wives ...	92
must not favour one wife to the prejudice of another ...	92
duty of, towards wife ...	91—94
authority of, in respect of wife's property ...	114
rights of, over wife and when those to be exercised ...	114, 115
when a, may compel his wife to follow him on journey ...	115
when may punish a wife in moderation ...	115, 116
must not use violence towards wife for her fault ...	115, 116
arbitration as to disputes between, and wife ...	116
liable to punishment for using violence towards wife ...	117
inheritance where either, or wife dies during <i>Iddat</i> ...	133
right of, to take wife back during <i>Iddat</i> ...	133
access of, to wife during <i>Iddat</i> ...	133
to inform wife about his exercising the right of return ...	134
right of, to empower his wife to repudiate herself ...	147, 148
when entitled to his share in his wife's estate ...	158
right of, to legally repudiate his wife ...	160
liability of, to pay maintenance in <i>Khula</i> repudiation ...	163
right of, to claim cost of child's suckling ...	164
right of, as to <i>Hazanah</i> ...	164, 165
liability of, to furnish child's maintenance ...	165

I

Iddat—

proposal of marriage to woman observing ...	2, 4
marriage during period of, absolutely null and void ...	4
marriage not permissible with a woman observing ...	18
maintenance to a woman observing, with a view to marriage ...	68, 69
validity of marriage of woman already married or in ...	80
subsistence of marriage during ...	133
husband's access to wife during ...	133
inheritance where either husband or wife dies during ...	133
right of husband to take wife back during ...	133
dispute as to the expiration of ...	135
period of, and how it is to be counted ...	135
wife's right to inheritance in case of husband's death while she is observing ...	155
death of wife during, entitles husband to his share in her estate ...	158
wife's maintenance during, where apostasy precedes consummation of marriage ...	173
or term of probation ...	174—184
cases in which, is incumbent ...	174, 175
definition of ...	175
duration of, for women who have not attained puberty ...	175
duration of, for women who have attained puberty ...	176

Iddat—*contd.*

Page.

duration of, where wife repudiated before her age of puberty	...	176
period of, how counted	...	176
how change of life affects	...	177
where a woman must observe, for seven months	...	177
of a pregnant woman	...	177
for a widow	...	178
where husband dies during wife's, under revocable form	...	178
effects of remarriage during	...	179
date from which, commences	...	179
place in which, must be observed	...	180
cases in which, is not incumbent	...	180
cases where wife is entitled to maintenance during her period of	181, 182	
cases where wife forfeits her right to maintenance during	...	182
paternity of child born of a woman observing	...	191
when a woman observing, asserts that she bore a child within two years	194	
acknowledgment by a woman neither married nor observing, of a child		
of unknown parentage as son	...	199
suckling during	...	205
suckling after expiry of	...	206
maintenance and lodging during, marriage being dissolved for fosterage	210	
wife's right to remove child entrusted to her custody during and after	...	219

Identity—

birth and, of child how proved	...	194
--------------------------------	-----	-----

Ihram—

meaning of	...	170
------------	-----	-----

Illicit Intercourse—

a prohibition to marriage	...	17
marriage with woman pregnant by, lawful on condition	...	19

Illness—

repudiation during	...	150—158
effects of irrevocable repudiation during husband's}	...	155
cases of wife's inheritance where repudiated during husband's last	156, 157	
effect of <i>Khula</i> repudiation offered by wife during last	...	167

Immovable Property—See *Property*.**Impediments—**

to marriage	...	15—20
-------------	-----	-------

Impotency—

a ground of having marriage cancelled	...	11
---------------------------------------	-----	----

Impotency—*conold.*

suit for separation on the ground of	...	...	...	169
separation on account of husband's	...	...	...	169—171
right of wife to demand separation for husband's	...	...	...	169
procedure where husband denies wife's allegation of	...	...	...	170—171
effect of separation for	...	...	...	171

Imprecation—

See *Lian*.

Imprisonment—

maintenance of wife when husband undergoing	...	...	96, 97
maintenance of wife during her	...	...	99

Incapacity—

legal	313—318
-------	-----	-----	---------

Increase—

right of wife to dower and its, where repudiated before consummation	...	...	...
of marriage	...	...	54

Inheritance—

in temporary or <i>Mutah</i> marriage	...	...	10
where religion different between husband and wife	...	...	76
where a woman acknowledges a man as husband	...	...	90
where either husband or wife dies during <i>Iddat</i>	...	...	133
wife's right to, in case of husband's death while observing <i>Iddat</i>	...	...	155
cases of wife's, where repudiated during husband's last illness	...	...	156, 157
wife's right of, from deceased husband who apostatized	...	...	173
husband's right of, from deceased wife who apostatized	...	...	174
of illegitimate child	...	...	188
of a child recognised by a Mahomedan as his	...	...	196

Inhibition (Hajr)—

definition of	313
---------------	-----	-----	-----

Instrument of Gift—

See *Gift (s)*.

Invalid Marriages—

See *Marriage (s)*.

Irrevocable Gift—

See *Gift (s)*.

Irrevocable Repudiation—

See *Repudiation*.

Islam—*Page.*

what constitutes equality in	...	...	...	...	37
marriage of non-Muslim where wife embracing	...	...	...	...	76
marriage of non-Muslim where husband embracing	...	...	...	...	77
marriage of non-Muslim where both embracing	...	...	...	...	78
religion of child when husband or wife embraces	...	...	...	...	78
fatherless minor child not bound to embrace, when grandfather accepting	...	...	...	...	78
that faith	...	...	...	...	78
where child to embrace	...	...	...	...	78, 79

J**Jami-ur-Rumuz—***See Bibliography.***Jawahir-i-Naverah—***See Bibliography.***Jewess**

marriage of Muslin with a, when lawful	...	...	...	20, 74
witness necessary in such marriage	...	...	...	74
evidence where a, denies the marriage	...	...	...	74
right of Muslim already married to a Muslim woman to marry a	...	...	...	74
how to be treated where there is a Muslim co-wife	...	...	...	74
validity of marriage where a, married to Muslim husband becomes a	...	...	...	75
Christian	...	...	...	75
religion of children born of marriage between a Muslim and a	...	...	...	75
dissolution of marriage where husband of a, turns Muslim	...	...	...	77
power of judge to dissolve marriage contracted by a, while observing	...	...	...	78
<i>Iddat</i>	...	...	...	78

Journey—

maintenance of wife on	98
------------------------	-----	-----	-----	-----	----

Judge—

power of, to contract marriage of the minor where nearer relation refuses	...	...	...	...	25
proposal	...	...	...	...	25
limit of power of, in marriage of female orphan in his charge	...	...	...	...	33
power of, to appoint matrons to examine condition of child wife	...	...	...	...	66
how to decide a dispute as to dower	...	...	...	...	76, 77, 78
when can dissolve marriage between non-Muslims	...	...	...	...	78
power of, to dissolve marriage contracted by a Christian woman or	...	...	...	...	78
Jewess while observing <i>Iddat</i>	...	...	...	...	236
power of, to appoint another guardian where father as guardian	...	...	...	...	236
misapplies his children's property	...	...	...	...	236

K**Khula Repudiation—***See Repudiation.*

	<i>Page.</i>
Kitabiah—	
meaning of ...	... 175n
Kunz-ul-Dukaik—	
<i>See Bibliography.</i>	
Kurat-ul-Ayoon—	
<i>See Bibliography.</i>	

L

Lakeet—	
<i>See Foundling.</i>	
Legacy—	
rules as to...	... 279
to two persons together exceeding one-third of testator's property	283, 284
when a debt takes precedence over a	... 292
when, takes precedence over a share	... 292
Legal Effects—	
of marriage ...	4—14
Legal Incapacity—	
persons who are under	313, 318
Legatee—	
existence of, at the time of will	... 273
how and when a, becomes owner of property bequeathed	... 281
right of, to use and enjoy property bequeathed	... 286, 287
right of, to standing crops of land bequeathed	... 287
right of, when produce of land bequeathed without mention of any	
period ...	... 288
Lian—	
effect of separation consequent upon oath of	... 189
conditions necessary to demand oath of	... 186, 187
Legitimacy—	
presumption of, for marriage follows the bed	... 196
Limitation—	
for suit to realize prompt dower	... 44
for suit to realize deferred dower	... 45
in a suit for recovery of a wife	... 122
————— for restitution of conjugal rights	... 122
as to debt for maintenance decreed by judge	... 226
Limitation Act—	
<i>See Acts.</i>	

Loan -	<i>Page.</i>
dispute as to marriage outfit given as	72

Lodging—	
wife's clothing and	104—107
husband cannot compel wife to provide, in her dwelling for his rela- tions or children	105
of a co-wife in the same house	106
during <i>Iddat</i> where marriage dissolved on the ground of fosterage ...	210

Lower Burmah Courts Act -See *Acts*.**Lunatic—**

acts of, when valid	313, 314
—— when void	313, 314
responsibility of adult, for offences against person or property ...	315
cases where adult not responsible for his transactions	315

M**Madras Civil Courts Act—**See *Acts*.**Mafkood—**See *Missing person*.**Maintenance—**

claim of suitor for sum advanced for, of woman	68, 69
to a woman observing <i>Iddat</i> with a view to marriage	68, 69
right of wife to :	
when husband too young	95
while residing in her father's house	95
in other cases	96
of a sick wife	96, 98
when husband undergoing imprisonment	96, 97
of wife's servants	97
when wife too young for sexual intercourse	97
right to, when capable of being enforced	97
of wife on journey	98
of wife engaged in independent profession	98
of wife during her imprisonment	99
of rebellious wife	99
of wife where marriage void	99
paid under decree when may be refunded	100
rules regulating amount of wife's	100—104
scale of wife's	100
alteration in wife's	100

Maintenance—contd.

right of wife to, when accrues	...	...	...	...	101
how to be paid	...	...	...	...	101
payment of, how regulated	...	...	...	...	101
where not supplied regularly	...	...	...	...	101—102
where husband in straitened circumstances	...	...	...	...	102—103
where wife may demand surety for	...	...	...	...	103
where may be modified	...	...	...	...	103
where husband absent and has left effects	...	...	...	...	107
where absent husband left no effects	...	...	...	...	108
recovery of the amount where husband advanced, before he left	...	...	...	...	108
where husband denies the marriage	...	...	...	...	108
where husband proves that marriage was dissolved	...	...	...	...	109
burden of proof where depositary or debtor provided	...	...	...	...	109
where husband left movable and immovable property	...	...	...	...	109
wife's taking, from absent husband's property without a judicial decree					
when lawful	...	...	...	...	110
debts for	...	...	...	...	110
payable before debts	...	...	...	...	110
where treated as a debt	...	...	...	...	110
right to sue for, when accrues to a wife	...	...	...	...	110
when judge not decreeing, for the past	...	...	...	...	111
debt for, where not subject to law of limitation	...	...	...	...	111
where wife cannot recover	...	...	...	...	111
where claim to arrears of, extinguished	...	...	...	...	111, 112
judicially decreed remains a debt against husband	...	...	...	...	112
recovery of, advanced by husband or by his father	...	...	...	...	112
where husband may be released from paying	...	...	...	...	113
where may be set off against another debt	...	...	...	...	113
wife how to decide where empowered to choose between, or repudi-					
ation	...	...	...	...	148
in <i>Khula</i> repudiation	...	...	...	...	161, 162
liability of husband to pay, in <i>Khula</i> repudiation	...	...	...	...	163
of child in <i>Khula</i> repudiation	...	...	...	...	165
right of wife to, where apostasy precedes consummation of marriage	...	...	...	...	173
of wife during <i>Iddat</i>	...	...	...	...	174—184
where wife not blamed for dissolution of marriage	...	...	...	...	182
where wife to be blamed for dissolution of marriage	...	...	...	...	182, 183
other cases where wife is entitled to, on dissolution of marriage	...	...	...	...	183
where not fixed by judge or husband	...	...	...	...	184
where fixed by mutual agreement	...	...	...	...	184
widow not entitled to, though pregnant	...	...	...	...	184
of illegitimate child	...	...	...	...	188
of a child acknowledged as son	...	...	...	...	195
where a foundling is destitute and acknowledged by nobody	...	...	...	...	203
during <i>Iddat</i> where marriage dissolved on the ground of fosterage	...	...	...	...	210
when father must provide, for his adult son	...	...	...	...	221

Maintenance—*concl'd.**Page.*

liability of father for, of his adult unmarried daughter	...	221
of child when devolves upon relations	... ..	221
penalty where father refuses to provide, for his child	...	222
relations to provide, of child where father's proceeds not sufficient	...	222
where mother is liable for, of her child	... ..	222
where near relations are liable for child's	... ..	222
where ascendants liable before collateral relations for child's	...	223
of child where father is missing	... ..	224
liability of father for, of his minor son's wife	... ..	224
of parents by child	... ..	226—229
award of daughter-in-law's, against her father-in-law: competency of		
court in	... ..	225
fixation of amount of, by judge where father's allowance inadequate	...	225
mother's agreement with father as to child's	... ..	226
limitation as to debt for, decreed by judge	... ..	226
of father when ill, infirm and unable to take care of himself	...	227
of mother when marries a second time	... ..	227
of poor parents when incumbent on child	... ..	227, 228
of poor parents when child missing but left property behind	...	228
of aged, crippled and sick when falls on public money	...	228
proportion of, due to poor parents	... ..	228
of relations other than ascendants and descendants	...	229—234
difference of religion when affecting the obligation of	...	230
obligation of, on whom rests	... ..	230
where there are several relations of same degree	...	230, 231
debt for, when extinguished	... ..	234
obligation of executor to provide reasonable, for his ward	...	307
where executor advances ward's, from his own fund	...	308
administrator's power to provide, for missing person's relations	...	321

Majority Act—*See Acts.***Marital authority—**

exercise of	114—117
-------------	--------	---------

*See Authority.***Marriage (s)—**

proposal of	... ..	1—3
when can be made to a woman	... ..	1
conditions requisite for	... ..	1
to a married woman	... ..	1
right of married woman to marry another	... ..	1
suit regarding, general rules to form decisions as to	...	2
Statutes and Acts applicable to Musalmans in India as to their		
personal law on	... ..	2
proposal of, to a woman observing <i>Iddat</i>	... ..	2, 4

	<i>Page.</i>
Marriage (s)—<i>contd.</i>	
proposal of, when allowable to obtain widow's hand...	2
contract of, with widow when not lawful	2
with widow when invalid	3
right of suitor to see face and hands of woman before	3
promises of, when incomplete	3
when party to, may retract promises or agreement	3
written agreement not constituting a contract of, but only a mode of proving it	3
reading of <i>Al Fatiha</i> not sufficient to constitute	3
conditions requisite for a valid	4—11
when said to be legally contracted	4
declaration and acceptance are essential in a valid	4
by whom declaration for, may be made	4
during period of <i>Iddat</i> absolutely null and void	4
when a person competent to contract	4, 5
Indian Majority Act not affecting the capacity of a Mahomedan in the matter of	5
age of puberty to contract, according to Mahomedan Law on what depends	5
child given in, when can ratify or repudiate it	5
consent to, essential to bind the party	5
neither writing nor religious ceremony necessary to contract a valid	5
words of proposal and acceptance by whom and before whom to be made to complete the transaction of	5
a civil contract	5
validity and operation of, on what made to depend	5
daughter given in, by father the marriage cannot be annulled by her on her coming of age	5
<i>nikah</i> form of, amongst Mahomedans	6
declaration and acceptance of, where both contracting parties present	6
attention of parties contracting, should not be distracted	6
party contracting, should hear each other's words even when uttered in foreign language	6
acceptance not to vary from declaration in contract of	6
must be completed at one meeting	6
when not valid	6
conditions necessary for witnesses to	6
qualification of witnesses present in contract of	6
deaf man not a qualified witness to	7
contract of, before witness asleep or intoxicated not valid	7
contract of, when both parties Mussalmans	7
suit for jactitation of, lies in a civil court	7
witnesses necessary when a father gives his adult daughter in	7
witnesses necessary when a father present at the, of his minor daughter	7
when written contract necessary in, and when not	8
duties of woman to whom proposal of, addressed	8
proposal of, how contracted	8

Marriage (s)—*contd.*

Page.

without settlement of dower valid	8
fixation of dower before, not necessary	9
not valid when contracted subject to a condition of which realization is certain	9
valid and condition void when contracted under illegal condition	9
temporary or <i>Mutah</i> , void	9
Shiah and Sunni school as to temporary or <i>Mutah</i>	10
inheritance where, contracted under the form of <i>Mutah</i>	10
by exchange valid	10
no reservation of option of seeing each other or imposition of any other condition in contract for	10
contract for, with stipulation for beauty or virginity in woman and for total absence of malady or infirmity in man—contract valid and stipulation void	11
legal effects of	11–14
liabilities of husband and wife by establishment of	11, 12
what constitutes, in law	12, 13
effect of, contracted without witnesses or legal conditions	14
effect of, cancelled before cohabitation or any equivalent act	14
cohabitation as husband and wife is evidence of	14
presumption of	14
impediments to	15–20
legal limit of number of wives by	15
necessary conditions for the validity of	15
perpetual and temporary prohibitions to	15
contract of, between a Mahomedan woman and a non-Musalman invalid	16
of a Mahomedan woman to a second husband during first husband's life-time	16
prohibited degrees of relationship in	16
with daughter or mother of a wife when forbidden	17
illicit intercourse constituting a prohibition to	17
fosterage produces an impediment to	17
with sister, aunt and niece of a wife when not valid	18
not permissible with a woman observing <i>Iddat</i>	18
with two sisters by one contract: decision as to	18
with fifth wife when unlawful	19
union with a free woman after marrying four slave girls is not the fifth	19
with woman during pregnancy when unlawful	19
of a Muslim with fire-worshippers, &c., unlawful	20
of a Muslim with non-Muslim woman when lawful	20
cohabitation when not a presumption of	20
where intervention of a guardian in, an essential condition to its validity	21
validity of contract of, by next nearest relation the nearer relation being absent	21
right of remote relation to contract marriage of minor where nearer relation rejects the proposal	24

Marriage (s)—contd.

ties of consanguinity, affinity or fosterage rendering, void ...	79
penalty of husband contracting illegal ...	79-80
validity of, with woman already married or in <i>Iddat</i> ...	80
with two sisters under one contract when void ...	80
validity of, where two sisters married one after the other ...	81
cases of where absolutely void... ..	82
witnesses necessary in a Mahomedan ...	82
legal effects of void ...	83
legitimacy of child born of void ...	83
of guardian with his adult ward when void ..	83
separate contract by separate guardian for, of the same ward : validity of	83
validity of, contracted by remote relation ...	84
ratification of guardian in, when necessary ...	84
validity of, contracted by invalids without guardian's consent ...	84
by agent when no woman mentioned ...	85
by agent authorized to contract for one woman only but contracting	
for two by single contract ...	85
by agent to two women by two successive contracts ...	85
by agent to a woman specified ..	85
contracted by agent when valid ...	85
contracted by agent when not binding on his principal ...	85
ratification of, by principal ...	85
contract of, by agent authorized by woman ...	86
cancellation of, unless difference of dower made good ...	86
contracted by a person without authority ...	87
how proved ...	87, 90
testimony of witness where dispute as to actual ..	87
under misrepresentation ...	87
acknowledgment when proof of ...	88, 90
testimony of guardian against his ward where, denied ...	88
presumption when in favour of ...	89
presumption of, where man and woman living as husband and wife ...	89
acknowledging a son when proof of ...	89
maintenance of wife where, void ...	99
recovery of amount where husband denies the ...	108
—where husband proves that, was dissolved ...	109
dissolution of ...	124
where husband may dissolve, by repudiation ...	124
subsistence of, during <i>Iddat</i> ...	133
husband's inheritance in wife's estate where dissolution of, brought	
about by her ...	158
<i>Khula</i> repudiation cancels all debts arising from dissolved ...	161
<i>Khula</i> repudiation when occurs before consummation of ...	161
when wife may keep her child born of dissolved, until of age ...	164
compensation in <i>Khula</i> repudiation where, void ...	168
where apostasy takes place after consummation of ...	173

					Page.
Marriage (s)—concl.					
where apostasy precedes consummation of	...	...	...	...	173
right of wife to maintenance on dissolution of	...	181, 182, 183,	184	...	
presumption of legitimacy from, follows the bed	...	...	...	...	196
fosterage is an impediment to	...	...	...	...	207
effect of suckling regarding prohibition to	...	...	...	...	208
impediments to, where one of the two wives suckles the other	...	...	...	...	209
Marriage outfit—					
present of, by father in good health	...	...	...	...	71
possession of, during father's death-illness	...	...	...	...	71
purchase of, by father with his own money	...	...	...	...	71
purchase of, by father from dower	...	...	...	...	71
contention of, as a loan	...	...	...	...	72
exclusive property of wife	...	...	...	...	72
where there is a dispute as to, local custom to serve as guide	...	...	...	...	72
Married Women's Property Act—					
See <i>Acts</i> .					
Marz-ul-maut—					
conditions necessary to establish	...	...	...	...	154
defined	...	...	...	...	246, 247
Matrons—					
who may appoint, to examine condition of child wife	...	...	...	...	33
Mesne profits—					
account of, of property held by wife in lieu of dower	...	...	...	...	46
Midwife—					
testimony of trustworthy Muslim, in proof of child's birth and identity	...	...	...	...	194
Minor—					
order of guardianship for, and invalid adult in marriage	...	...	...	...	22
who may be the guardian of, and invalid adult in marriage	...	...	...	...	22
remote relation no priority over nearer relation in marriage of	...	...	...	...	24
adult when to be treated as	...	...	...	...	26
marriage according to law of Sunni school when voidable by	...	...	...	...	28
right of, on attaining puberty to cancel marriage	...	...	...	...	29
where father liable for dower in respect of	...	...	...	...	64
power of father as guardian to dispose of property of minor	...	...	...	...	64
compensation and dower in <i>Khula</i> repudiation in respect of	...	165, 166	...	...
right and liability of father in respect of, in <i>Khula</i> repudiation	...	165, 166, 167	...	...
definition of	...	...	...	...	301
acts of, when valid	...	...	...	...	313—314
——— when void	...	...	...	...	313—314
responsibility of, for offences against person or property	...	...	...	...	315
cases where, not responsible for his transactions	...	...	...	...	315

	<i>Page.</i>
Minor—<i>coneld.</i>	
where a guardian can authorize a, to engage in trade ...	317
right of, authorized to trade	317
when can choose between father and mother	319
Misrepresentation—	
marriage under	87
Missing Persons—	
See <i>Person.</i>	
Mortgage—	
effect of, where mortgagor not the guardian of infant's property ...	234
Mahomedan Law as to	235
Mother—	
marriage with daughter or, of a wife when forbidden	17
right of care and custody of child wife belongs to her, and not to her husband	33
right of husband to recover his child wife from custody of her ...	34
cases where a, bound to suckle her child herself	204
right of, to remuneration for suckling the child	205
right of, to custody of her child	210
———when forfeited	211
when liable for her child's maintenance	222
maintenance of, when she marries a second time	227
a <i>de facto</i> guardian	235
Mufti—	
or law-giver	317
Munhat-ul Khaliq—	
See <i>Bibliography.</i>	
Mutah—	
where wife in lieu of dower entitled to	56
where wife entitled neither to dower nor to	57
when due instead of dower	66
in <i>Khula</i> repudiation	161
right of wife to, in case of apostasy before consummation of marriage ..	173
Mutah Marriage -	
temporary or, void	9
Shiah and Sunni school as to temporary or	10
inheritance in	10
N	
Niece—	
marriage with sister, aunt and, when valid	18

	<i>Page.</i>
Nights—	
husband's partition of, where several wives	92
———on a journey	93
Nikah form—	
of marriage amongst Mahomedans	6
Nobility—	
acquired superior to that inherited	37
O	
Oath—	
declaration on, for settlement of dower	66, 67
effect of husband's, as to repudiation	146
conditions necessary to demand, of <i>lian</i>	186, 187
effect of separation consequent upon, of <i>lian</i>	189
Oaths Act—	
See <i>Acts</i> .	
Offences—	
responsibility of minor and adult lunatic for their, against persons and property... ..	315
Old age—	
not affecting virginity of a woman	33
Order—	
of guardianship for minor and invalid adult in marriage	22
Oudh Laws Act—	
See <i>Acts</i> .	
Ownership—	
of household effects how settled	73
of property how transferred	247
P	
Paralysis	
repudiation by persons suffering from	154
Paralytic—	
gift by, valid	389
Parents—	
duties of, towards child	204
maintenance of, by child	226—229
maintenance of poor, when incumbent on child	227, 228
obligation of children to maintain poor, is irrespective of their shares	228, 229
Paternal Authority—	
See <i>Authority</i> .	
Paternity—	
where child born six full months from date of valid marriage ...	185
and filiation	185—204

Paternity—*concl'd.**Page.*

where husband denies legitimacy of a child	...	...	186
of child born of a void marriage before separation	...	...	190
of child born of cohabitation by mistake	...	...	190
of child born of a seduced woman	...	...	190
of child born of a woman observing <i>Iddat</i>	...	...	191
of child born of a widow observing <i>Iddat</i>	...	...	191
of child born of a young wife not subject to menstruation	...	...	192
of child where wife claims to be pregnant when repudiated	...	...	193
of child born to a young widow	...	...	193
of child born within two years since repudiation or husband's death	...	...	194
acknowledgment of	...	...	194—201
doctrine of acknowledgment not applicable where, of a child is known	...	...	198
acknowledgment of a foundling as to	...	...	202

See *Relationship*.**Payment—**

of dower where wife's virginity is stipulated for	...	...	59
of dower where wife's beauty is stipulated for	...	...	59
husband' liability for, of stipulated or proper dower	...	...	60
of maintenance how regulated	...	...	101

Penal Code—See *Acts*.**Penalty—**

of husband contracting illegal marriage	...	...	79, 80
where father refuses to provide maintenance of his child	...	...	222

Person—

when competent to contract marriage	...	...	4, 5
when held to be missing	...	...	320
power of agent appointed by a missing	...	...	320
power of judge to order sale of property of missing	...	...	321
power of administrator to provide maintenance for relation of missing	...	...	321
how long a missing, is to be regarded as alive	...	...	323
procedure where the death of a missing, declared by judge	...	...	327
where a missing, discovered to be in existence or returns	...	...	327
procedure where heirs or debtors of a missing, claim that he is dead	...	...	327—328
presumption as to life of a missing	...	...	322
presumption as to death of a missing	...	...	323

Phthisis—

repudiation by persons suffering from	154
---------------------------------------	-----	-----	-----

Possession—

deed of settlement covering property not in, of settlor	...	...	42
retention of, until dower satisfied	...	...	44
retention of, until dower paid	...	...	45

	<i>Page.</i>
Possession—<i>conclud.</i>	
of widow in lieu of dower	47
widow's right to take, of her husband's real estate in lieu of dower ...	47
of marriage outfit during father's death illness	71
in case of gift. See <i>Gift (s)</i> .	
Postponement—	
of separation for a year when granted	169
Presumption—	
of marriage	14
cohabitation when not a, of marriage	20
as to puberty of a girl	23
as to dower	44
when in favour of marriage	89
of marriage where man and woman living as husband and wife ...	89
of legitimacy from marriage follows the bed	196
as to legitimization of a child how made	197
as to whether a missing person is alive	322
Principal—	
contract of marriage by agent when binds	35
how far bound when agent exceeds authority	36
ratification of marriage by	85
obligation of, as to marriage contracted by agent	85
liability of, to acknowledge marriage where larger dower settled by agent	86
Probate and Administration Act—	
See <i>Acts</i> .	
Prodigal—	
bequest of, when valid	274
validity of acts of a	316
Profession—	
equality in respect of, or trade	38, 39
maintenance of wife engaged in independent	93
Promises—	
of marriage when incomplete	3
when party to marriage may retract, or agreement	8
Prompt—	
division of dower as, and deferred	42
when a dower to be considered as	43
Prompt Dower—	
See <i>Dower</i> .	

Proof—

Page.

of marriage	...	...	...	...	...	87—90
of marriage by acknowledgment	..	...	...	...	...	88
acknowledging a son when, of marriage	...	...	...	...	...	89
acknowledgment when, of marriage	...	...	...	...	...	90
testimony of trustworthy Muslim midwife in, of child's birth and identity	...	...	...	...	...	194
of child's birth	...	...	...	...	...	194—201

Proper Dower—See *Dower*.**Property—**

Muslim cannot act as guardian in the administration of the, of non-Muslim	...	...	...	...	...	24
while non-Muslim can act as guardian in the administration of the, of non-Muslim	...	...	...	...	...	24
no portion of, given to a wife as dower can without her permission be given to another wife	...	...	...	...	...	42
where cannot be made subject of dower	...	...	...	...	...	42
where given to wife in her dower without being specified	...	...	...	...	...	42
deed of settlement covering, not in possession of settlor	..	...	...	...	...	42
priority of widow's claim on her husband's, in lieu of dower	...	...	...	...	...	44
simple contract of money-payment for dower not necessarily giving right to wife over husband's	...	...	...	...	...	45
account of mesne profits of, held by wife in lieu of dower	...	...	...	...	...	46
validity of gift of immovable, in lieu of whole dower	...	...	...	...	...	46
widows' right to purchase, as her own with dower-money	...	...	...	...	...	46
widows' right to sell, in possession in lieu of dower	...	...	...	...	...	47
where estate becomes the actual, of wife	...	...	...	...	...	61
power of father, as guardian to dispose of, of his minor sons	...	...	...	...	...	64
not the object of marriage	...	...	...	...	...	70
husband's authority in respect of wife's	..	...	...	...	...	114
power of wife in respect of her	...	...	...	...	...	114
found in the person of a foundling	...	...	...	...	...	202
sale of landed, of child by guardian when permissible	...	...	...	...	...	233
sale of, by a Mahomedan lady belonging to her and certain minors	...	...	...	...	...	234
when guardian may sell his ward's	...	...	...	...	...	234
effect of mortgage where mortgagor not the guardian of his ward's	...	...	...	...	...	234
power of guardian to sell minor's immovable	...	...	...	...	...	234
sale of, by <i>de facto</i> guardian	...	...	...	...	...	235
cancellation of sale of minor's	...	...	...	...	...	236
right of father to sell and purchase, for his child	...	...	...	...	...	237
suit against father for recovery of	...	...	...	...	...	238
when held to be indivisible	...	...	...	...	...	252
that may be lawfully given	...	...	...	...	...	252—259
that can be bequeathed	...	...	...	...	...	274
when testator can bequeath whole of his, to a single person	...	...	...	...	...	274

Property—concl'd.

liability as to loss of, bequeathed	...	...	...	282, 283
sale of, by executor	...	...	...	304—305
gift of. See <i>Gift (s)</i> .				
See <i>Bequest, Legacy and Wills</i> .				

Proposal of Marriage—

See *Marriage and Proposal*.

Proposal—

words of, and acceptance by whom and before whom to be made to				
complete the transaction of marriage	...	...	...	5
duties of woman to whom, of marriage addressed	...	...	...	8
of marriage how contracted	...	...	...	8

Punjab Laws Act—

See *Acts*

Puberty—

age of, to contract marriage under Mahomedan law in what depends	...	...	...	5
age of, how to be determined	...	...	...	318
guardianship ceases at the age of	...	...	...	319
minor cannot choose between father and mother before	...	...	...	319

Q**Quality—**

of clothing how determined	105
----------------------------	-----	-----	-----	-----

R**Radd-ul-Muhtar—**

See *Bibliography*.

Raji Repudiation—

See *Repudiation*.

Ramazan—

definition of	169n
---------------	-----	-----	-----	------

Ratification—

power of child given in marriage as to its	...	...	...	5
effects of	...	...	...	35, 36
of marriage by principal	...	...	...	85

Razaat—

See *Suckling*.

Reason—

age of, how fixed	318
-------------------	-----	-----	-----	-----

Reciprocal rights—

and duties of husband and wife	91—123
--------------------------------	-----	-----	-----	--------

	<i>Page.</i>
Recovery—	
of the amount where husband advanced maintenance before he left ...	108
where husband denies the marriage	108
where husband proves that marriage was dissolved ...	109
Registration of Muhamadan Marriages and Divorces Act—	
See <i>Acts</i> —	
Regulation—	
IV (Bom.) of 1827, s. 28	2
Relations—	
right of next nearest, to contract marriage the nearer relation being	
absent	24
procedure where nearer, refuses the proposal of marriage of his minor ...	24, 25
contract of marriage where there are two, of the same degree ...	25
validity of marriage contracted by remote	84
when to provide maintenance of child... ..	222
maintenance of poor	229
Relationship—	
testimony necessary to establish	200
Religion—	
child to follow his father's	75
of child born of marriage between a Muslim and a Christian woman	
or a Jewess	75
no inheritance between husband and wife where, different ..	76
of child when husband or wife embraces Islam	78
of fatherless minor child when grandfather embraces Islam ..	78
difference of, when affects obligation of maintenance	230
difference of, not affecting a bequest	281
Re-marriage—	
with a woman repudiated three times when lawful	19
with wife repudiated by one or two irrevocable repudiations ...	141
legal effects of, on previous repudiations	142
effect of, during <i>Iddat</i>	179
impediments to, where one of the two wives suckles the other ...	209
Remuneration—	
where a mother entitled to, for suckling child	205
for suckling equivalent to a contract for hire	206
where mother engaged to suckle her child	206
for suckling not lost by father's death	207
Repudiation—	
dispute as to dower if arises after, but before consummation ...	66
mere arbitrary act of a Mahomedan husband	125

	<i>Page.</i>
Repudiation--contd.	
in respect of marriages by <i>Mutah</i> form	125
where pronounced during intoxication	125
by dumb man	125
where husband considered incapable of pronouncing a valid	126
right of minor's father or minor himself to pronounce a valid	126
how may be expressed	126
delegation of power of, to a third party	126
effect of husband's signing an instrument of, before wife's father	127
writing where not necessary to the validity of a	127
husband may give his wife an option of	127
number of	128
by <i>taluk</i> not complete and irrevocable by a single declaration	129
no special expression necessary to constitute a valid	129
what constitutes a valid	129
express formula for, defined	129
implied formula for, defined	130
pronouncing of the word <i>talak</i> three times when not a valid	130
use of certain expression meaning not to be received back as wife	
constitutes a valid	130
exact words used in, are of vital importance	130
<i>raji</i> , and its legal effects	131-135
expression involving a revocable	132
expression involving a, by implication	132
marriage-tie not dissolved by a revocable, until <i>Iddat</i> completed	132
when revocable and irrevocable	134
different kinds of	131
revocable, and its legal effects	131-136
when a, is revocable	137
when a, is irrevocable	137
when a revocable becomes irrevocable	138
with compensation irrevocable	138
expressions that constitute an irrevocable	139
when a vow of continence effects an irrevocable	139
legal effects of irrevocable	140
legal effects of a final or triple	141
re-marriage with wife repudiated by one or two irrevocable	141
legal effects of re-marriage on previous	142
not affecting woman whose marriage is void	143
definition of conditional and unconditional	143
to take effect at a future time—explained	144
with suspensive condition when takes effect	144
effect of conditional	145
effect of husband's oath as to, where conditional	145
effect of suspended	146
where subject to two conditions	147
effect of wife's declaration regarding	147
how pronounced	147

Repudiation—*concl.**Page.*

withdrawal of	...	...	...	...	...	147
right of husband to empower his wife to pronounce	...	...	...	...	...	147, 148
wife when to decide where empowered between maintenance or	...	...	...	...	...	148
operation of single irrevocable, where wife given discretionary power	...	...	...	...	...	149
where a revocable, takes effect	...	...	...	...	...	149
where wife exceeds her authority in number of	...	...	...	...	...	149
where wife does not adhere to the form of, authorized	...	...	...	...	...	150
during illness	...	...	...	...	...	150-153
in other cases	...	...	...	...	...	154
effects of irrevocable, during husband's illness	...	...	...	...	...	155
by mutual consent of husband and wife in <i>Khula</i> form	...	...	...	...	...	158-168
definition of <i>Khula</i>	...	...	...	...	...	158, 159
validity of <i>Khula</i> , granted under compulsion	...	...	...	...	...	159
conditions necessary in <i>Khula</i>	...	...	...	...	...	159
when a <i>Khula</i> , can validly take place	...	...	...	...	...	159
conditions that modify a <i>Khula</i>	...	...	...	...	...	159
amount of compensation necessary in <i>Khula</i>	...	...	...	...	...	160
fit subject for compensation in <i>Khula</i>	...	...	...	...	...	160
where <i>Khula</i> , equivalent to irrevocable repudiation	...	...	...	...	...	160
compensation where proposal of <i>Khula</i> , emanates from husband	...	...	...	...	...	160
judicial decree not necessary in <i>Khula</i>	...	...	...	...	...	160
<i>Khula</i> , where it emanates from husband	...	...	...	...	...	160
<i>Khula</i> , where it emanates from wife	...	...	...	...	...	161
withdrawal of <i>Khula</i>	...	...	...	...	...	161
effects of <i>Khula</i> , with compensation	...	...	...	...	...	161
in <i>Khula</i> form when occurs before consummation of marriage	...	...	...	...	...	161
in <i>Khula</i> form cancels all debts arising from dissolved marriage	...	...	...	...	...	161
maintenance in <i>Khula</i>	...	...	...	...	...	161, 162
dower in <i>Khula</i>	...	...	...	...	...	161, 162
<i>Mutah</i> in <i>Khula</i>	...	...	...	...	...	161
effects of <i>Khula</i> , without compensation	...	...	...	...	...	162
where dower is compensation for <i>Khula</i>	...	...	...	...	...	162
suit for debts in <i>Khula</i>	...	...	...	...	...	162
liability of wife to suckle and maintain child in <i>Khula</i>	...	...	...	...	...	163, 164
custody of child in <i>Khula</i>	...	...	...	...	...	164, 165
child's maintenance in <i>Khula</i>	...	...	...	...	...	165
compensation and dower in <i>Khula</i> , in respect of minor	...	...	...	...	...	165, 166
right and liability of father in respect of minor in <i>Khula</i>	...	...	...	...	...	165, 166, 167
effect of <i>Khula</i> , offered by wife during last illness	...	...	...	...	...	167
in <i>Khula</i> form by wife legally incompetent	...	...	...	...	...	167
liability of agent for compensation in <i>Khula</i>	...	...	...	...	...	168
compensation in <i>Khula</i> , when payable	...	...	...	...	...	168
compensation in <i>Khula</i> , where marriage void	...	...	...	...	...	168
paternity of child born within two years since, or husband's death	...	...	...	...	...	194

Restitution of conjugal rights—See *Conjugal Rights*.

	<i>Page.</i>
Retirement—	
what constitutes valid	53
legal effect of valid	53
where valid, not amounting to consummation of marriage	56
Return—	
or taking back wife how it is constituted	133
right of, how to be exercised	134, 135
what constitutes a valid	134
husband to inform wife about his exercising the right of	134
when the right of, ceases	135
Revocable Repudiation—	
See <i>Repudiation</i> .	
Revocation—	
of a will how made	282
denial of a will not constituting	282
of gift. See <i>Gifts</i> .	
S	
Sabæans—	
marriage of a Muslim with, unlawful	20
Sale—	
of landed property of child by guardian when permissible	233
question of legal necessity in case of	233
of property by a Mahomedan lady belonging to her and certain minors	234
of property by <i>de facto</i> guardian	235
when a child can cancel, made by its father	236
gift of property in consideration of ornament amounts to a	267
gift for consideration is in effect a, and purchase	267
of property by executor	304—305
Seizin—	
transfer of, is unnecessary in <i>hiba-bil-awaz</i>	264
one of the essential acts for giving validity to a gift	265
how effected	265
Separation—	
postponement of, when a judge to grant	169
suit for, on the ground of impotency	169
right of wife to demand, for husband's impotency	169
on account of husband's impotency	169—171
on account of apostasy	172—174
where a judge to pronounce	170
effect of, for impotency	171
when husband and wife apostatize at the same time	172

Settlement—	<i>Page.</i>
deed of, covering property not in possession of settlor ...	42
void but contract valid where unlawful thing settled as dower ...	42
basis of, in case of dispute as to amount of dower ...	66
declaration on oath for, of dower ...	66, 67
Settlor—	
deed of settlement covering property not in possession of ..	42
Sharh-i-Vikayah—	
See <i>Bibliography.</i>	
Shiah School—	
validity of <i>Mutah</i> marriage according to ...	10
prohibits marriage between a Shia woman and non-Mussulman ...	16, 20, 75
contract of marriage with a Christian not valid according to ...	20, 75
requirements in <i>fazooles</i> marriage according to ...	28
amounts of dower according to ...	40
option as to time when amount of dower may be fixed according to ...	41
repudiation in marriage by the <i>Mutah</i> form ..	125
right of mother to the custody of her daughter according to ...	217, 218
when mother is deprived of such custody ...	218
right of father governed by, to the custody of his children ...	218
gift of a house for residence is governed by the rule of the Sunni school ...	252
where rule of, silent rule of Sunni school applies ...	252
validity of gift of undivided property according to ...	253
as to transfer of property where possession taken under invalid gift ...	254
right to dispose of property by will according to ...	277
Sister (s)—	
marriage with, aunt and niece of a wife when not valid ...	18
marriage with two, under one contract when void ...	80
Special Marriage Act—	
See <i>Acts.</i>	
Star-worshippers—	
marriage of a Muslim with, unlawful ...	20
Status—	
of husband and wife at first Christians and subsequently Mahomedans ...	14
where custom fails reference to be made to, of woman and amount ...	
of fixed dower ...	43
acknowledgment of a child as son gives the child, of a son ...	197
of an heir how determined ...	290
Suckling—	
of the child by mother ...	204
where a mother entitled to remuneration for, of her child ...	205

	<i>Page.</i>
Suckling—<i>contd.</i>	
liability of father to provide a wet-nurse for child's	205
during <i>Iddat</i>	205
remuneration for, equivalent to a contract for hire	206
after expiry of <i>Iddat</i>	206
remuneration for, not lost by father's death	207
effect of, regarding prohibition to marriage	208
Suit—	
general rules to form decisions in, regarding marriage, &c. ..	2
for jactitation of marriage lies in a civil court	7
limitation for, to realize prompt dower	44
limitation for, to realize deferred dower	45
by widow against estate of her late husband to realize dower	46
for dower by heir of a widow	62
for restitution of conjugal rights when not maintainable ...	119
limitation in a, for recovery of a wife	122
————— for restitution of conjugal rights	122
for separation on the ground of impotency	166
in respect of missing person's property	323
Suitor—	
right of, to see face and hands of intended bride before marriage	3
claim of, for sum advanced for maintenance of woman ...	58, 69
T	
Tafrik—	
or formal separation	169
Tafsirat-ul-Ahmedia—	
See <i>Bibliography.</i>	
Tafweez—	
or wife's power to repudiate herself	147
Tahtavi—	
See <i>Bibliography.</i>	
Talak—	
signification of the word	129
Tamlik—	
defined	248
Tankihul Hamidiah—	
See <i>Bibliography.</i>	

	<i>Page.</i>
Testator—	
right of, to give preference to one heir over another ...	279
death of, caused by a person in whose favour a bequest was made ...	279
liability of, where loss of object bequeathed while in his possession ...	282
right of, having heirs to make a bequest	283
where bequeaths an unspecified share subject to variation ...	284
where bequeaths a thing definite and specified two-thirds having perished ...	285
where bequeaths a specified sum having a debt against the estate ...	285
where bequeaths right of residence in or rents of a house ...	286
where bequeaths usufruct to one and property to other person ...	288
cannot restrict functions of executor	294
revocation of executorship by	296
Testimony—	
of trustworthy Muslim midwife in proof of child's birth and identity ...	194
necessary to establish relationship	200
Trade—	
equality in respect of profession or	38, 39
where a guardian can authorise a minor to engage in ...	317
right of minor authorized to	317
Transaction—	
of gratuitous nature when and how far valid	289
Transfer—	
of possession of property subject of gift. See <i>Gift (s)</i> .	
Transfer of Property Act—	
See <i>Acts</i> .	
U	
Umdat-ul-Riayah—	
See <i>Bibliography</i> .	
Unconditional repudiation—	
See <i>Repudiation</i> .	
V	
Verbal Contract—	
See <i>Contract</i> .	
Vilayat—	
See <i>Authority</i> .	
Virgin—	
consent of, consulted by distant relation as to her marriage how to be expressed	32
when wife to be treated as	33
Virginity—	
accident not affecting, of a woman	33
payment of dower where wife's, is stipulated for	59

	<i>Page.</i>
Virtue—	
equality in respect of, or otherwise	38
Void Marriages—	
See <i>Marriage</i> .	
W	
Waiver—	
of widow's claim to dower.	52
Ward—	
right of, to demand dissolution of marriage contracted by guardian ...	27
right of, compelled in marriage to cancel contract at puberty ...	28
separate contract by separate guardian for marriage of the same ...	83
marriage of guardian with his adult, when void	83
testimony of guardian against his, where marriage is denied ...	88
executor must provide reasonable maintenance for his	307
when executor advances maintenance of, from his own fund ...	308
when executor can deliver property to	311
Wasaya—	
See <i>Wills</i> .	
Wasi—	
See <i>Executors</i> .	
Wasiatnamah -	
See <i>Will</i> .	
Wet-nurse—	
liability of father to provide a, for child's suckling... ..	205
where a hired, may be compelled to renew her agreement	207
Widow—	
when proposal of marriage allowable to obtain hand of	2
contract of marriage with, when not lawful	2
marriage with, when invalid	3
right of, to claim the balance of dower for marriage	9
priority of the claim of, on her husband's property in lieu of dower ...	44
lien of Mahomedan, for balance of dower	44
right of, to dower is personal and does not pass to purchaser of estate ...	46
suit by, against estate of her late husband to realize dower	46
right of, to purchase property as her own with dower-money	46
right of, to sell property in possession in lieu of dower	47
right of, to take possession of her husband's real estate in lieu of dower	47
right of, to dower where there is no deed to that effect	51
suit for dower by heir of a	62
right of heir of, to demand dower from husband's heirs	63
not entitled to maintenance	184
paternity of child born of a, observing <i>Iddat</i>	191
position of, in respect of deceased husband's estate... ..	232

Wife—

liabilities of husband and, by establishment of marriage	11—12
cohabitation as husband and, is evidence of marriage	14
marriage with daughter and mother of a, when forbidden	17
marriage with sister, aunt and niece of a, when not valid	18
when marriage with fifth, unlawful	19
when to be treated as virgin	33
no portion of property given to a, as dower, can without her permission	
be given to another wife	42
where property given to, in her dower without being specified	42
lien of, on her husband's estate in lieu of dower	44
claim of, to full amount of dower discussed	45
time when right of, to dower is acquired	45
simple contract of money payment for dower not necessarily giving	
right to, over husband's property	45
account of mesne profits of property held by, in lieu of dower	46
gift of immovable property to, in lieu of whole dower	46
cases where, entitled to proper dower	49
right of, to remit her claim to dower	52
power of adult, to remit dower in her husband's favour	52
right of, to additions made to dower	52
right of, over whole dower once perfected never forfeited	53
right of, to dower and its increase where repudiated before consum-	
mation of marriage	54
where to restore dower to husband	54
right of, to dispose of dower	54
when entitled to stipulated dower	55
when in lieu of dower entitled to <i>Mutah</i>	56
when neither entitled to dower nor <i>Mutah</i>	57
payment of dower where virginity of, is stipulated for	59
payment of dower where beauty of, is stipulated for	59
liability of husband to pay the stipulated or proper dower to, even in	
absence of stipulated virginity	60
who may receive dower on behalf of a minor	60
dower is the sole property of	61
where estate becomes the actual property of	61
right of husband in case of gift of dower by	61
not to be compelled to relinquish her dower	62
where can claim dower either from husband or surety	64
claim of, to prompt dower after her surrender to her husband	65
claim of, in respect of dower which is lost	65
validity of marriage where a Christian, married to a Muslim becomes	
a Jewess and <i>vice versâ</i>	75
when proper dower in full to be paid to	67
right of Muslim with a Muslim, to marry a Christian woman or a	
Jewess	74
marriage of non-Muslim where, embraces Islam	76
testimony of, where dispute as to actual marriage	87

	<i>Page.</i>
Wife—<i>concl.</i>	
acknowledging a woman as, when proves the marriage	89
acknowledgment as, must be distinct and unmistakable	89
husband's duties towards	91—94
one, may abandon her rights in favour of another	93
remedy of, in case of her husband's unjust treatment	94
when deemed to be rebellious	99
right of, to demand wages from husband for cooking	104
when entitled to demand clothing from husband	104
clothing and lodging of	104—107
when can claim a new garment	104
when to be provided with a separate dwelling or apartment	105
when cannot be compelled to provide lodging to husband's relation or children	105
when can claim to be removed to another dwelling	105, 106
where husband bound to provide another dwelling or a companion for his	106
what articles a husband bound to provide for his	106
when may release her husband from paying maintenance	113
cannot set off her debt against maintenance	113
contracts by, when valid	114
not bound to contribute anything towards household expenses	114
power of, in respect of her property	114
husband must not use violence towards his, for her fault	115, 116
rights and duties of, towards her husband	117—123
who may refuse her person to her husband	117, 118
decree for recovery of	122
limitation in a suit for recovery of	122
when may leave her husband's house without permission	122
right of, to visit her relation	122, 123
right of, to attend her sick father	123
cost of litigation due to, against her husband	130
liability of, to suckle and maintain child after <i>Khula</i> repudiation	163
liability of, where articles of compensation perish before delivery	163
when may keep her child born of dissolved marriage until of age	164
right of, as to <i>Hazanah</i>	164, 165
right of, to the estate of a person acknowledging a child as his son	195
right of, to remove child entrusted to her custody during and after <i>Iddat</i>	219
right of, to acknowledge debt, legacy or share when repudiated at her request	291
release of a debt by, in favour of husband in her last illness when valid	291
Will(s)—	
or <i>wasaya</i>	271—293
nature of a	271—283
condition requisite for validity of a	271—283
persons capable of making a	271
fixation of signature as a consenting party gives validity to a	271
legal effect of omission to put a, in writing	272

Will(s)—concl'd.**Page.**

policy of Mahomedan law as to disposal of property by	...	...	272
as to payment of monthly allowance to a certain person after testatrix's			
death	...	...	272
not signed : validity of	...	...	272
who can execute a	...	...	273
legatee must be living or conceived at the time of	...	...	273
object bequeathed by, must be susceptible of being transferred	...	...	273
made in favour of lawful son of testator's eldest son not then born	...	...	273
disinheriting nearest relations and leaving whole property to nephew :			
effect of	...	...	275
right of testatrix to make a, of her whole property	...	...	275
diverting all property of testator from his next heirs invalid...	...	...	275
to a stranger of one-third of testator's property valid	...	...	276
to strangers and relations : validity of	...	...	277
extent of executor's power over testator's property under	...	...	277
Hidaya as to disposition of property by	...	...	277, 278
appointment of an infidel executor does not invalidate a	...	...	296

Witness(es)—

qualification of, present in contract of marriage	...	...	6
deaf man not a qualified, to marriage	...	...	7
number of, necessary where a father present at the marriage of his minor			
daughter	...	...	7
contract of marriage before, asleep or intoxicated not valid	...	...	7
necessary when a father gives his adult daughter in marriage	...	...	7
effect of marriage contracted without, or legal conditions	...	...	14
for appointment of agent for marriage	...	...	34
for determination of proper dower	...	...	50
in marriage of a Muslim with a Christian woman or a Jewess	...	...	74
necessary in a Mahomedan marriage	...	...	82
evidence of, being descendants of parties not admissible	...	...	88
necessary to prove birth of child born within two years since repudiation			
or husband's death	...	...	194
testimony of, necessary to establish relationship	...	...	200

Woman—

when proposal of marriage can be made to a	...	...	1
proposal of marriage to a, observing <i>Iddat</i>...	...	...	2, 4
duties of a, to whom proposal of marriage addressed	...	...	8
marriage of a Mahomedan, to a second husband during first husband's			
lifetime	...	...	16
union with a free, after marrying four slave girls is not the fifth			
marriage	...	...	19
marriage of a Muslim with non-Muslim, when lawful	...	...	20
Shiah and Sunni school as to marriage between a Mussalman, and a man			
not of her religion	...	...	20
continued cohabitation between a Mahomedan and a Hindu, not a pre-			
sumption of marriage	...	...	20

	<i>Page.</i>
Woman—<i>concl.</i>	
validity of marriage of insane, contracted by her son ...	29
right of option of, to cancel marriage how to be exercised ...	29
marriage of, against wish of <i>Asab</i> relation how to be impugned ...	31
consent of adult, essential in marriage ...	31
silence does not amount to consent in adult ...	32
when to be treated as virgin ...	33
remedy of agent to realize guaranteed dower paid to the ...	35
obligation of agent authorized by, to give her in marriage ...	35
inferiority of, not rendering marriage invalid ...	36
conditions necessary to make a man equal of a rich ...	38
power of guardian of, to cancel marriage ...	39
status of, for determining dower ...	43
married without dower entitled to proper dower ...	50
claim of suitor for sum advanced for maintenance of ...	68, 69
when to return gift or dower advanced with a view to marriage ...	69
maintenance to a, observing <i>Iddat</i> with a view to marriage ...	68, 69
marriage of Muslim with a Christian, or Jewess ...	74, 76
Muslim, only to marry a Muslim husband ...	74
religion of child born of marriage between a Muslim and a Christian, or a Jewess ...	75
validity of marriage with, already married or in <i>Iddat</i> ...	80
right of, to marry another man where repudiated by her husband ...	80
contract of marriage by agent authorized by ...	86
where must observe <i>Iddat</i> for seven months ...	177
<i>Iddat</i> of a pregnant ...	177
paternity of child born of a, observing <i>Iddat</i> ...	191
paternity of child born of a seduced ...	190
observing <i>Iddat</i> when asserts that she bore a child within two years ...	194
where a married, claims to have given birth to a child ...	194
acknowledgment by a, neither married nor observing <i>Iddat</i> , of a child of unknown parentage as son ...	199
where a, acknowledges a foundling as her son ...	203

Z

Zouvil Arham—

or uterine relation ...	214
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